

Advertising: Not “Low Value” Speech

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The Supreme Court has long afforded commercial messages in a newspaper or magazine less protection than it has the rest of the publication's content, a doctrinal distinction that is largely supported by First Amendment scholars. This Article, after a thorough inquiry into the customs and legislative practices of the generation that framed and ratified the First Amendment, contends that this contemporary judicial and scholarly treatment of advertising as “low value” speech is misplaced. After tracing the evolution of the Court's current commercial speech doctrine—and locating the origins of the distinction between commercial and noncommercial speech in a now-discredited Lochner-era line of cases—the Article critically assesses the Court's current treatment of advertising. Although the Court's recent decision in 44 Liquormart, Inc. v. Rhode Island suggests the possibility that the Court is moving towards a more protective stance in commercial speech cases, the Court persists in its treatment of advertising as “low value” speech. Accordingly, the Article concludes that an abandonment of the distinction between commercial and noncommercial speech is necessary both to return modern Supreme Court jurisprudence to original First Amendment principles and to eliminate the inconsistency and confusion that the distinction has produced in the lower federal courts.

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Introduction

Advertising dramatically affects what we moderns say, wear, do, and believe. After all, who among us has not moaned “I can’t believe I ate the whole thing,” asked “Where’s the beef?” or, more recently, joked, “I love you, man.” For good or ill, advertising, in Bill Bennett’s words, “incline[s] and condition[s] [our] views toward a particular world view,”¹ inspiring us not only to “be all that [we] can be,” but also to “just do it.”

Advertising also fosters competitive markets and educates Americans about choices vital to their lives. In fact, as Nobel Prize winning economist George Stigler observed more than thirty years ago, advertising is “an immensely powerful instrument for the elimination of ignorance.”² Advertising is also of intense interest to Americans. To quote the Supreme Court, “[T]he particular consumer’s interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day’s most urgent political debate.”³ Justice Scalia was more concrete in quipping at an oral argument that Americans may care more about their decision to buy a house than about the war in Bosnia.⁴

Furthermore, advertising is a highly visible and essential component of the modern free press. Most newspapers average a ratio of between 65-70% advertising to 30-35% editorial content.⁵ Other publications, such as magazines, often have an even higher advertisement-to-editorial ratio.⁶ The *Washington Post* reported that 80% of its income “comes from thousands of businesses, individuals, nonprofit organizations and others

1 William J. Bennett, Address at the First Annual Images of Ourselves Conference, Sponsored by Center for the Study of Popular Culture (Feb. 24, 1996).

2 George Stigler, *The Economics of Information*, 69 J. POL. ECON. 213, 220 (1961).

3 *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976).

4 See Oral Argument Transcript at 20, *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), available in 1992 WL 687873.

5 See CONRAD C. FINK, STRATEGIC NEWSPAPER MANAGEMENT 43 (1988).

6 See, e.g., HALL’S MAGAZINE REPORTS, December 1991, at 10B (reporting that *Bride’s* magazine consisted of 77.6% advertisements during 1991).

who buy space to advertise their wares, services, and thoughts.”⁷ It is not an overstatement to say that advertising is the driving force behind the information age.

In spite of these beneficial effects of advertising, the Supreme Court has long treated the commercial messages in a newspaper or magazine differently than it has the rest of the publication’s content. Generally, the Supreme Court interprets the First Amendment as barring government efforts to regulate speech based on its content. The government may limit the time, place, and manner of speech, but only if it does so in a content-neutral way.⁸

In sharp contrast, the Supreme Court allows restrictions on commercial speech—even if that speech is truthful and concerns a product or service that may be lawfully sold—if the government can show it “directly advances” a “substantial governmental interest” in a manner “not more extensive than is necessary to serve that interest.”⁹ A restriction will be upheld if there is a “reasonable fit” between the restriction’s goals and the means employed to achieve those goals.¹⁰ The specific meaning of these terms of art, and the way in which this balancing test is applied, is not important to understanding the basic point: the balancing test gives the government considerably more power to control the content of advertising than it has to control the content of other communications, such as those that concern scientific, artistic, and especially political issues.

Many First Amendment scholars support the Supreme Court’s distinction between commercial and noncommercial speech.¹¹ For example, Professor Cass Sunstein argues that political speech should be firmly protected because it promotes deliberative democracy.¹² Sunstein believes that the First Amendment gives the government much greater power to regulate commercial speech,¹³ which he believes the Supreme

7 *Read All About It*, WASH. POST, Feb. 11, 1998, at H1.

8 *See, e.g.,* *Frisby v. Schultz*, 487 U.S. 474, 481 (1988).

9 *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 573 (1980) (Blackmun, J., concurring).

10 *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416 (1993).

11 *See, e.g.,* Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181, 1187 (1988) (stating that commercial speech “is not a central theoretical concern of the First Amendment”); William Van Alstyne, Essay, *Remembering Melville Nimmer: Some Cautionary Notes on Commercial Speech*, 43 U.C.L.A. L. REV. 1635, 1640 (1996) (describing as “disconcerting” the idea that commercial speech be afforded equal First Amendment treatment with other categories of speech); *cf.* Alex Kozinski & Stuart Banner, *Who’s Afraid of Commercial Speech*, 76 VA. L. REV. 627, 628 (1990) (noting that “the academic literature embraces the [commercial-noncommercial] distinction wholeheartedly; professors take it as a given and then devote their energies to discerning a principle to justify it, rather than the other way around”).

12 *See* CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 123-24 (1993); *see also* ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* (1960) (arguing for a broader understanding of the freedom of speech).

13 *See* SUNSTEIN, *supra* note 2, at xviii.

Court properly treats as "low value."¹⁴

This Article contends that the contemporary judicial treatment of advertising as "low value" speech is misplaced. The most obvious support for this view that commercial speech should not be given second-class status can be found in the text of the First Amendment itself: "Congress shall make no law . . . abridging the freedom of Speech, or of the Press."¹⁵ The fact that the text does not explicitly distinguish between advertisements and other types of messages, of course, cannot end the inquiry—the planning of a criminal conspiracy, for instance, is technically "speech," but few would contend that such "speech" is protected under the First Amendment. Rather, one must examine the original understanding of the First Amendment to determine the categories of speech that will be afforded constitutional protection. This Article argues that the colonial history leading up to the passage of the First Amendment demonstrates that the judiciary should subject government attempts to regulate advertising content to the same searching inquiry that it employs in assessing restrictions on other messages. As long as a commercial message is truthful and concerns a lawful product or service—admittedly, key qualifications—the government should not have any more power to restrict that message than it does other, noncommercial messages.

This argument is of great practical importance. Americans have a love-hate relationship with advertising. Although, as mentioned above, many find advertising entertaining and informative, many others are highly suspicious of advertising. Given the diminished constitutional protection currently afforded commercial speech, advertising is therefore a frequent target of regulators. To illustrate, both the most present and most recent former chairmen of the Federal Communications Commission (FCC) have urged the Commission to bar or severely to limit the advertising of spirits on broadcast television.¹⁶

Further attempts to restrict commercial speech appear likely, as high-profile attacks on advertising have recently come from both conservatives and liberals. (It is often joked that liberals hate commercial speech because

14 The first step in any First Amendment inquiry is as to whether the speech is of "low value," and therefore not deserving of full constitutional protection. *See id.* at 8-10. The Court has designated several categories of speech for such "low value" treatment. *See, e.g.,* *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964) (libel); *Roth v. United States*, 354 U.S. 476, 484 (1957) (obscenity); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (fighting words). Although its recent jurisprudence indicates that the Supreme Court has moved to a richer protection of commercial speech than of some of these other "low value" categories, *see infra* Part IV.A, commercial speech is nonetheless clearly not afforded full First Amendment protection—and thus remains of "low value" under present law.

15 U.S. CONST. amend. I.

16 *See* Sally Goll Beatty, *Local Broadcasters Gingerly Study Options in Wake of Liquor Repeal*, WALL ST. J., Nov. 11, 1996, at B5; Bryan Gruley, *New FCC Chief Shows Willingness to Aid Firms Unable to Pay for PCS Licenses*, WALL ST. J., Nov. 4, 1997, at B11.

it is commercial, and conservatives hate it because it is speech.) Thus, a recent article in the conservative *Weekly Standard* called for a ban on advertising of gambling,¹⁷ and liberals have made a centerpiece of their policy agenda attacks on the advertising of "unhealthy" products, especially cigarettes. Some of these proposed limitations are quite extreme. For example, among the many restrictions on tobacco advertisements proposed by the Clinton Administration's Food and Drug Administration (FDA) is a bar on the use of color and pictures in tobacco advertisements, except in a narrow class of adult publications, and a complete ban of tobacco advertisements in media not pre-approved by the FDA.¹⁸

Furthermore, many proposals to ban billboards, tobacco, and alcohol advertising, as well as "inappropriate" advertising are under consideration or are being adopted at the state and local levels. These restrictions target particular types of advertisements, and are therefore content-based. For example, the City of Compton, California has banned cigarette and alcohol advertising in "publicly visible location[s],"¹⁹ and San Francisco is currently considering a comparable measure.²⁰ Similar measures have been enacted or are being considered in communities around the country.²¹

17 See David Tell, *Wanna Bet?*, THE WKLY. STANDARD, Dec. 15, 1997, at 11.

18 See Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396 (1996) (to be codified at 21 C.F.R. pts. 801, 803, 804, 807, 820, 897). These regulations are discussed in more detail *infra* at notes 285-92 and accompanying text.

19 Kevin O'Leary, *Compton Bans Tobacco, Alcohol Billboards Ads*, L.A. TIMES, Oct. 23, 1997, at B3.

20 See Edward Epstein, *S.F. Moves to Extinguish Outdoor Tobacco Ads*, S.F. CHRON., Oct. 10, 1997, at A17.

21 Many jurisdictions have recently enacted restrictions on outdoor tobacco and alcohol advertising. See, e.g., Fran Spielman, *Billboards Get Smoked*, CHI. SUN-TIMES, Sept. 10, 1997, at 1 (Chicago, Ill.); Caroline Y. Ullmann, *Group Wants All-Out War on Smoking*, MORNING NEWS TRIB., Jan. 15, 1997, at A1 (Tacoma, Wash.); Thaa Walker, *Oakland Council OKs Limits on Alcohol, Tobacco Billboards*, S.F. CHRON., Dec. 4, 1997, at A24 (Oakland, Cal.). Milwaukee is currently considering adopting similar restrictions. See Mike Nichols, *Kalwitz Seeks Limits on Alcohol, Tobacco Ads*, MILWAUKEE J. SENTINEL, July 30, 1997, at 3. Billboard advertising of tobacco has been restricted in Baltimore. See Eric Siegel and Joanna Daemrich, *Council Favors Restrictions on Tobacco Billboards*, BALTIMORE SUN, Feb. 1, 1994, at 2B. Similar measures are being considered in other cities as well. See, e.g., Robert Farley, *Proposal to Ban Some Billboards Spurs City Debate*, HARRISBURG PATRIOT, Oct. 30, 1997, at B5 (Harrisburg, Pa.); Hawke Fracassa, *In Macomb County: Warren Considers Tobacco Proposal*, DET. NEWS, Dec. 2, 1997, at C5 (Warren, Mich.); *Mayor Wants to Impose Ban on Tobacco Billboards*, ST. LOUIS POST-DISPATCH, Aug. 14, 1997, at 4B (Springfield, Miss.). The New York City Council has passed a measure (not yet approved by the mayor) that would prohibit tobacco advertising within 1000 feet of schools, playgrounds, daycares, and other "children's institutions." See Vivian S. Toy, *City Council Votes Strict Legislation on Cigarette Ads*, N.Y. TIMES, Dec. 18, 1997, at A6. Other cities have enacted or are considering enacting ordinances similar to the New York measure. See, e.g., Josh Meyer, *Ban OK'd on Cigarette Billboards*, L.A. TIMES, Dec. 23, 1997, at B1 (Los Angeles and Los Angeles County, Cal.); Caroline Y. Ullmann, *Group Wants All-Out War on Smoking*, MORNING NEWS TRIB., Jan. 15, 1997, at A1 (Seattle-King County, Wash.); Winifred Yu, *Council to Consider Banning Tobacco Ads Nears Schools*, TIMES UNION, Oct. 18, 1997, at B4 (Albany, NY).

Other proposals would give the government power to make judgments about the content of advertisements and would be clearly impermissible if applied to non-commercial messages. To illustrate, the New York City Metropolitan Transit Authority recently promulgated regulations prohibiting advertisements that are “offensive or in bad taste” to a “significant segment of the public” or are “harmful to the morale” of the transit authority’s employees.²² Thus, the question of whether the First Amendment bars many of these proposed regulations has enormous practical significance, for our politics as well as for the functioning of our market economy.

Part I of this Article sets forth the strong historical evidence demonstrating that commercial advertising was a critical part of the press that the Framers wanted to remain forever free. It shows that treating advertisements as encompassed within “the freedom of the press” is consistent with the Framers’ political philosophy, which equated liberty and property. This Part also demonstrates that advertising was not only ubiquitous in colonial America, but also played an indispensable role in the development of the American free press, which included, and relied on, advertising. Furthermore, the history of the First Amendment, which was adopted in part to bar stamp acts that directly taxed advertising, also supports affording truthful commercial speech about lawful products or services full protection from government regulation. Finally, Part I shows that the practices of state legislatures at the time the Bill of Rights was ratified further support the view that the Framers did not consider commercial speech to be of “low value”; in an era of extensive commercial regulation, the only restrictions on advertising concerned the promotion of unlawful activities, such as lotteries or horse racing.

Part II demonstrates that this robust American tradition of free commercial speech continued through the Civil War and the ratification of the Fourteenth Amendment, as advertising grew essentially unchecked and unregulated throughout the nineteenth century. Although the number of states and statutes increased, advertising continued to be barred only where it was used to publicize unlawful products, services, or activities. The Supreme Court’s treatment of truthful advertising during and immediately after Reconstruction was indistinguishable from the treatment accorded other forms of speech.

Part III identifies the source of the Supreme Court’s present distinction between commercial and noncommercial speech. While the Progressive Era witnessed both an increase in the power of advertising and more political and popular attempts to limit its influence, those efforts

22 STANDARDS FOR ADVERTISING § (a)(xiv), (a)(x) (New York City Metro. Transit Auth. 1997).

overwhelmingly focused on ensuring that advertising was truthful and nonmisleading. During this period, however, courts began analyzing constraints on commercial speech under the rubric of substantive due process—an ultimately discredited notion that much economic regulation violated the Constitution's Due Process Clause. This confusion of categories—commercial speech should have been treated as a First Amendment issue—led the Supreme Court to declare in 1942 that restrictions on advertising were purely economic regulations. Because the Court did not treat advertising as protected speech, subsequent restrictions on advertising were not subjected to any special constitutional scrutiny and were routinely upheld.

In light of this historical background, Part IV discusses and analyzes the Court's current commercial speech jurisprudence. It chronicles how, in the 1970s, driven in part by opposition to limits on advertisements for abortions, the Supreme Court began extending a measure of constitutional protection to commercial speech. This development culminated in a 1976 Supreme Court decision explicitly recognizing that advertising served consumer interests and was entitled to partial constitutional protection,²³ the meaning of which was clarified four years later in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.²⁴ Part IV argues that, although this trend in the Supreme Court's jurisprudence has generally been supportive of the right to advertise, a lack of clarity continues to mark the Supreme Court's jurisprudence under *Central Hudson*. Accordingly, the Article concludes by suggesting that the Court should abandon the balancing test set forth in *Central Hudson*, and embrace the First Amendment interpretation compelled by the historical evidence: that government attempts to restrict truthful commercial messages about lawful products and services should be subject to the same searching review currently employed in assessing attempts to restrict or limit the content of other types of speech, including speech about political ideas.

I. The Colonial Understanding of the Importance of Commercial Speech

Perhaps paradoxically, exploring the eighteenth-century approach to advertising can help bring clarity to a pressing late twentieth-century problem—i.e., what role should the government play in regulating advertising? As a matter of constitutional law, it is of critical importance that we understand whether the generation of the Framers believed the

²³ See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

²⁴ 447 U.S. 557, 566 (1980).

First Amendment to protect commercial speech; furthermore, as a broader matter it may be illuminating to explore the principles animating colonial Americans’ defense of a vibrant commercial press. This Part sets forth strong evidence showing that the generation of the Framers believed the right to advertise to be encompassed within “the freedom of the press” protected by the First Amendment. This conclusion follows from an examination of the property-based view of liberty held by the Framing generation, particularly James Madison; the ubiquitous presence of advertising in the colonial era, which demonstrates that the free exchange of commercial information was both the financial means and an independent end sustaining the nascent American press; and the reactions of defenders of a free press to restrictions on speech during the pre-Revolutionary period.

This Part also shows that state legislative practices at the time of the First Amendment’s ratification confirm the conclusion that truthful advertising about lawful products was understood by the Framers to be within “the freedom of the press.” The sole restrictions on the right to advertise at the time of the ratification of the Bill of Rights involved limits on messages which either advertised products or activities that were illegal or conveyed demonstrably false information. The evidence suggests that the generation of the Framers, rather than distinguishing between speech with political and commercial content, distinguished instead between patently false speech and speech that was either truthful or not subject to an assessment of its veracity.

A. *The First Amendment’s Orientation Towards the Protection of Property*

Professor John McGinnis notes that in seventeenth and eighteenth century England there were two reigning justifications for free expression: the idea that free speech “was an instrument to some collective good” and the notion that free speech was a “natural property right of the individual.”²⁵ This latter justification, he shows, “dramatically influenced the framing of the Constitution.”²⁶ McGinnis explains that:

The seeds of a property-centered First Amendment were blown across the Atlantic in three separate vessels. First, the two English episodes that were most renowned in the colonies as victories for freedom of the press—the termination of licensing laws and the denial of government power to seize written materials under general warrant—were both

25 John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 58 (1996).

26 *Id.* at 59.

justified on property-rights grounds. Second, the essays on the theory of government most widely read in the colonies saw liberty and property rights as essentially indivisible. Finally, the most sophisticated philosophical defense of the Whig theory of government and the primacy of property rights, namely John Locke's *Second Treatise on Government*, provided direct theoretical inspiration to James Madison—the drafter of the First Amendment.²⁷

In this Whig tradition, freedom of speech and property rights were seen as essential parts of an individual's liberty,²⁸ an understanding derived from the philosophical writings of John Locke, who defined the "state of perfect freedom" as the ability of people "to order their actions and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, without asking leave or depending upon the will of any other man."²⁹

The libertarian *Cato's Letters*, published from 1720 to 1723 and widely circulated in the colonies,³⁰ drew on Locke in equating explicitly liberty and property. Cato wrote:

By liberty, I understand the power which every man has over his own actions, and his right to enjoy the fruit of his labour, art, and industry, as so far as by it he hurts not the society, or any members of it, by taking from any member, or by hindering him from enjoying what he himself enjoys.³¹

Applying this view to the freedom of expression, Cato articulated the importance of free speech and its inextricable link with property rights: "This sacred privilege is so essential to free government, that the security of property; and the freedom of speech, always go together; and in those wretched countries where a man cannot call his tongue his own, he can scarce call anything else his own."³²

Cato's articulation of the tie between property rights and free speech was enormously influential in colonial America.³³ According to Clinton Rossiter, *Cato's Letters* was "the most popular, quotable, esteemed source

27 *Id.* at 59-60.

28 *See id.* at 63.

29 JOHN LOCKE, *THE SECOND TREATISE ON GOVERNMENT* 4 (Thomas P. Peardon ed., Bobbs-Merrill 1st ed. 17th prtg. 1975) (1690).

30 *See* CLINTON ROSSITER, *SEEDTIME OF THE REPUBLIC* 141 (1953).

31 JOHN TRENCHARD & THOMAS GORDON, 1 *CATO'S LETTERS* 427 (Ronald Hamow ed., Liberty Classics ed. 1995) (1720-23).

32 *Id.* at 110 (Essay No. 15, *Of Freedom of Speech: That the Same is Inseparable From Publick Liberty*, Feb. 4, 1720).

33 *See* JEFFREY A. SMITH, *PRINTERS AND PRESS FREEDOM: THE IDEOLOGY OF EARLY AMERICAN JOURNALISM* 25 (1988).

of political ideas in the colonial period.”³⁴ This influence is reflected in the comment of one newspaper commentator, who wrote that “Liberty and Property are not only join’d in common discourse, but are in their own natures so nearly ally’d that we cannot be said to possess the one without the enjoyment of the other.”³⁵ In fact, Cato’s *Essay on Free Speech*,³⁶ first printed in America by Benjamin Franklin,³⁷ contained the seed of the First Amendment’s Press Clause.

James Madison, who drafted the First Amendment, essentially regarded all rights, including the right of free speech, as a form of property right shielded from government interference. Echoing Locke and Cato, Madison wrote:

In its larger and juster meaning, [property] embraces every thing to which a man may attach a value and have right; and *which leaves to every one else the like advantage.*

In the former sense, a man’s land, or merchandize, or money is called his property.

In the latter sense, a man has a property *in his opinions and the free communication of them.*³⁸

Furthermore, in Madison’s view, the primary role of government was to guarantee these rights—including the right to free speech—to the individual: “Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*.”³⁹ Thus, the drafter of the First Amendment, like many others in colonial America, firmly believed in the tie between liberty and property. Providing further evidence of this common linkage of liberty and property was the Virginia Declaration of Rights, drafted by George Mason, which stated that among the natural rights of man was “the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.”⁴⁰

This preeminent emphasis on property rights strongly suggests that, contrary to the views of Sunstein and others, colonial Americans viewed

34 ROSSITER, *supra* note 30, at 141.

35 BOSTON NEWSLETTER, February 16, 1772, *quoted in* ROSSITER, *supra* note 30, at 379.

36 TRENCHARD & GORDON, *supra* note 31, at 110-17.

37 See LEONARD W. LEVY, FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON 3 (1996).

38 James Madison, *Property*, THE NATIONAL GAZETTE, Mar. 27, 1792, *reprinted in* JAMES MADISON, 14 PAPERS OF JAMES MADISON 266-68 (Robert A. Rutland et. al. eds., 1983) (1792) (second emphasis added).

39 *Id.*

40 DECLARATION OF RIGHTS § 1 (Va. 1776).

the First Amendment as protecting far more than just political speech. As one contributor writing under the pseudonym "Philaethes" declared in Boston's *Herald of Freedom* in 1788, Americans "are nurtured in the ennobling idea that to *think* what they please, and to *speak, write* and *publish* their sentiments with decency and independency on *every subject*, constitutes the dignified character of Americans."⁴¹ The theoretical emphasis placed by colonial Americans on property rights set forth in this Section indicates that commercial matters were to be counted among the "subjects" to which the freedom of speech obtained. As Richard Henry Lee of Virginia, perhaps the leading Anti-Federalist, said in his demand for a bill of rights, "A free press is the channel of communication as to mercantile and public affairs."⁴² As will be explained in the following Section, colonial Americans' abstract commitment to a free commercial press coincided with a vibrant practical tradition of commercial speech.

B. *The History of Advertising in Colonial America*

1. The British Model of Speech Regulation

The Framers and their contemporaries were well aware of the history of press repression in the "mother" country. England's seditious libel laws—which had subjected critics of the Crown to criminal punishment—and ecclesiastical bans on heresy predated the spread of the printing press.⁴³ Predictably, the English government considered the printing press a serious threat to its power. This technological breakthrough threatened the government's practice of limiting dissent by denying individuals access to information.⁴⁴

Rather than directly barring the new technology, however, English authorities sought more subtle controls: government licensing and taxation. For almost 200 years, the English licensing system ensured that the Crown's agents reviewed all printed material before distribution.⁴⁵ Printers were forced to post large bonds to acquire a license. These bonds were subject to forfeiture if a printer published material critical of

41 BOSTON HERALD OF FREEDOM, Sept. 15, 1788, *quoted in* SMITH, *supra* note 33, at 19 (emphasis added). Similarly, among the reasons given by the Continental Congress to settlers in Quebec in 1774 for the importance of the freedom of the press, was "the advancement of truth, science, morality, and arts in general." Address to the Inhabitants of Quebec (1774), *in* 1 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 223 (1971).

42 Letter XVI, Jan. 20, 1788, *in* AN ADDITIONAL NUMBER OF LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN 151-53 (1962) (emphasis added).

43 See FREDRICK S. SIEBERT, *FREEDOM OF THE PRESS IN ENGLAND: 1476-1776*, at 42, 380-81 (1952).

44 See *id.* at 41-63.

45 See *id.*

government authorities. Those who published without permission faced fines and imprisonment. Moreover, even after the licensing system was jettisoned in 1694 in response to objections by Whig printers, the government used taxes to choke off newspapers by driving up their costs.⁴⁶ The express purpose of Britain's first Stamp Act in 1712 was to control "licentious, schismatical, and scandalous" publications.⁴⁷

English-style restraints on the press were exported to colonial America in the form of taxation.⁴⁸ The slow rate of American newspaper development in the 1600s, however, was attributable not to government intervention, but rather to two structural impediments: a minimal interest in "news" beyond that already satisfied by the English papers and a lack of means for funding press operations.⁴⁹ American newspapers began to emerge only as colonial business and industry, particularly shipbuilding and ocean commerce, began to grow.⁵⁰ As small industries developed a need to inform the public of their wares, printers began publishing newspapers to spread that information. Thus, advertising was both a major impetus and means for establishing regularly published newspapers in colonial America. Nevertheless, the English system of suppression of free speech remained in place as the American press began to develop.

2. Advertising in Colonial America

As one commentator has observed, "Well before 1800 most English and American newspapers were not only supported by advertising but they were, even primarily, vehicles for the dissemination of advertising."⁵¹ The development of a free press and of a commercial, advertising-driven press were inextricably linked. In his introduction to *Benjamin Franklin's Letters to the Press, 1758-1775*, Verner W. Crane noted, "It was a commercial age, and [it] produced a commercial press."⁵²

The majority of the advertisements which appeared in colonial newspapers would be considered "commercial speech" today,⁵³ messages that propose a commercial transaction.⁵⁴ As commercial speech scholar

46 See *id.* at 306-22.

47 *Id.* at 309 (quoting the first Stamp Act, 1712, 10 Anne, ch. 18 (Eng.)).

48 See Eric Neisser, *Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas*, 74 GEO. L.J. 257, 263-64 (1985) (discussing the taxation of the American press during the 1700s).

49 See EDWIN EMERY & MICHAEL EMERY, *THE PRESS AND AMERICA* 18 (1978).

50 See *id.* at 19.

51 JAMES PLAYSTED WOOD, *THE STORY OF ADVERTISING* 85 (1958).

52 Verner W. Crane, *Introduction to BENJAMIN FRANKLIN'S LETTERS TO THE PRESS, 1758-1775*, at xi, xvi (Verner W. Crane ed., 1950).

53 See Kent R. Middleton, *Commercial Speech in the Eighteenth Century*, in *NEWSLETTERS TO NEWSPAPERS: EIGHTEENTH-CENTURY JOURNALISM* 277, 282 (Donovan H. Bond & W. Reynolds McLeod eds., 1977).

54 See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425

Kent R. Middleton noted, "The colonial press regularly carried reputable medical advertisements, as well as those for books, cloth, empty bottles, corks, and other useful goods and services."⁵⁵ Without these advertisements, the colonial press so important to the Revolutionary cause would almost certainly have been less vibrant, if it would have existed at all. Frank Mott, in his classic history of journalism, notes that during the eighteenth century, like today, "[a]dvertising represented the chief profit margin in the newspaper business."⁵⁶ As a source of information to the population at large, as well as a source of income to the colonial printers who played such an integral role in the struggle for freedom, advertising was both influential and plentiful during the latter part of the colonial era.

Among the goals of the first attempted colonial newspaper, entitled *Publick Occurrences, Both Foreign and Domestick*, which appeared in 1690, was the promotion of "Businesses and Negotiations."⁵⁷ The inaugural issue of the first successful American newspaper, the *Boston Newsletter*, published on April 24, 1704, contained the following solicitation: "This News-Letter is to be continued Weekly, and all Persons who have Houses, Lands, Tenements, Farms, Ships, Vessels, Goods, Wares or Merchandise, &c to be Sold or Let; or Servants Run-Away, or Goods Stole or Lost; may have the same inserted at a Reasonable Rate."⁵⁸ The next week's issue of the *Boston Newsletter* contained paid entries that sought the return of two lost anvils, offered a bounty for capturing a thief, and listed a "very good Fulling Mill to be Let or Sold" in Oyster Bay, New York.⁵⁹

Although paid advertising first appeared in the *Boston Newsletter*,⁶⁰ as Presbrey reports, it took about fifteen years for Benjamin Franklin and his brother James to come "into journalism and sow[] the seed of a free press and an expansion of advertising."⁶¹ Franklin not only sold advertising to support his publishing efforts, he also advertised in his own newspapers to promote the goods he sold in his Philadelphia shop.⁶² An early biographer of Ben Franklin credits him with having "originated the modern system of advertising."⁶³ In advertising his "Pennsylvania

U.S. 748, 762 (1976).

55 Middleton, *supra* note 53, at 282.

56 FRANK LUTHER MOTT, *AMERICAN JOURNALISM—A HISTORY OF NEWSPAPERS IN THE UNITED STATES THROUGH 250 YEARS: 1690-1960*, at 56 (3d ed. 1963).

57 *PUBLICK OCCURRENCES, BOTH FOREIGN AND DOMESTICK*, Sept. 25, 1690, at 1, *quoted in* FRANK PRESBREY, *THE HISTORY AND DEVELOPMENT OF ADVERTISING* 119 (1929).

58 *BOSTON NEWSLETTER*, Apr. 24, 1704, *quoted in* WOOD *supra* note 51, at 45.

59 *Id.*, *quoted in* WOOD *supra* note 51, at 45-46.

60 See *supra* note 57-59 and accompanying text.

61 PRESBREY, *supra* note 57, at 131; see also MOTT, *supra* note 56, 11-16.

62 See WOOD, *supra* note 51, at 48-49.

63 JAMES PARTON, *LIFE AND TIMES OF BENJAMIN FRANKLIN* (1864), *reprinted in* WOOD, *supra* note 51, at 48.

Fireplace” (now known as the Franklin stove), Franklin showed himself to be a consummate pitchman in extolling its virtues over those of an open fireplace: “Great and bright fires do also very much contribute to damaging the eyes, dry and shrivel the skin, and bring on the early appearance of old age.”⁶⁴

When the *New-Hampshire Gazette* was launched in 1756, its publisher said that the paper would

contain Extracts from the best Authors on Points of the most useful Knowledge, moral, religious, or political Essays, and such other Speculations as may have a Tendency to improve the Mind, afford any Help to Trade, Manufactures, Husbandry, and other useful Arts, and promote the public Welfare in any Respect.⁶⁵

True to its word, the *Gazette*, like the other newspapers of its day, carried everything from price lists to political philosophy.⁶⁶ Often, more than half of the standard colonial newspaper was taken up by advertising. In 1766, 70% of Hugh Gaine’s *New-York Mercury* consisted of advertising.⁶⁷

The first daily newspaper in the United States was established in 1784 primarily as a medium for advertising. When the *Pennsylvania Packet and General Advertiser* initially appeared, ten of its sixteen columns were filled with advertisements.⁶⁸ The name of this paper (as well as that of New York’s first daily, *The New-York Daily Advertiser*), reflected the common understanding that commercial advertisements were as much a part of the news of the day (and the purpose of the press) as reports of government activity. The front pages of the Boston, New York, and Philadelphia newspapers were devoted almost exclusively to advertising.⁶⁹ Indeed, as Mott reports, “Most dailies in these years used page one for advertising, sometimes saving only one column of it for reading matter.”⁷⁰

Also, for much of the colonial era, newspapers did not use layout techniques or differences in typeface to provide a visual distinction between the two; they were regarded as of equal interest to readers and treated the same.⁷¹ As advertising historian Frank Presbrey observed:

64 WOOD, *supra* note 51, at 51.

65 NEW HAMPSHIRE GAZETTE, October 7, 1756, *quoted in* SMITH, *supra* note 33, at 49 (emphasis added).

66 See LAWRENCE C. WROTH, *THE COLONIAL PRINTER* 234 (1938).

67 See A. LEE, *THE DAILY NEWSPAPER IN AMERICA* 32 (1937).

68 See PRESBREY, *supra* note 57, at 161.

69 See MOTT, *supra* note 56, at 157; *see also* WOOD, *supra* note 51, at 85.

70 MOTT, *supra* note 56, at 157.

71 See Middleton, *supra* note 53, at 281. This also may have been as a result of the technology available at the time.

Advertisements had as much interest as the news columns, perhaps greater interest, for they were more intimately connected with the readers' daily life than were the foreign items that made up so large a part of the news. Arrival of a new cargo of food or drink, or tools, likely was what the man, home from a reading at the coffee house or tavern, talked about at his fireside rather than the reception of a new envoy at some court in Europe.⁷²

In light of the importance of advertising to colonial Americans, attempts by modern constitutional scholars to treat commercial speech as "low value" seem peculiar. Advertisements were necessary to the colonial press not only because the revenue they generated was required for newspapers to exist; they were also thought to have independent value in educating and informing the reading public. As the prominent printer-historian Isaiah Thomas, editor of an ardently pro-Revolutionary newspaper, wrote, "[A]dvertisements are well calculated to enlarge and enlighten the public mind, and are worthy of being enumerated among the many methods of awakening and maintaining the popular attention, with which more modern times, beyond all preceding example, abound."⁷³

In fact, one of the best-known statements in defense of a free press—Franklin's famous *Apology for Printers*⁷⁴—was written in response to an attack on an advertisement printed by Franklin. In 1731, Franklin printed a politically incorrect advertising notice for a ship's captain. The advertisement was not part of a newspaper; it was distributed as a stand-alone commercial handbill. The paper simply proposed a commercial transaction by seeking additional freight and passengers for the captain's ship. At the bottom of the advertisement was the note, "No Sea Hens nor Black Gowns will be admitted on any Terms."⁷⁵

72 PRESBEY, *supra* note 57, at 154. As an interesting aside, advertising also played a role in the lives of individuals who helped found the republic. For example, to attract settlers to his land holdings in Ohio, George Washington advertised in the July 15, 1773, *Maryland Advocate and Commercial Advertiser* and in a September issue of the *Pennsylvania Gazette*. See WOOD, *supra* note 51, at 67. He also wrote a letter to Major General Henry Knox of New York asking him to obtain "superfine American Broad Cloths" to outfit himself and his wife, which he had learned about "from an Advertisement in the New York Daily Advertiser." Letter from George Washington to Henry Knox (Jan. 29, 1789), *reprinted in id.* at 69.

73 HISTORY OF PRINTING IN AMERICA WITH A BIOGRAPHY OF PRINTERS, AND AN ACCOUNT OF NEWSPAPERS (1810), *quoted in* D. BOORSTIN, THE AMERICANS: THE COLONIAL EXPERIENCE 328 (1958). Justice Blackmun echoed these words nearly two centuries later in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), stating that "It is a matter of public interest that [private economic] decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable." *Id.* at 765.

74 *An Apology for Printers* (1731), *reprinted in* 2 WRITINGS OF BENJAMIN FRANKLIN 172, (Albert Henry Smith ed., 1907).

75 *Id.* at 176.

This handbill outraged the local clergy (the “Black Gowns”), although it is unclear whether they were more offended by their exclusion from the pool of desirable passengers or from their placement in the same category as women of ill repute (“Sea Hens”). In response to attacks on the advertisement, Benjamin Franklin published his *Apology for Printers* which, according to one later commentator, was at that time, “[b]y far the best known and most sustained colonial argument for an impartial press.”⁷⁶ Originally published in the June 10, 1731, edition of the *Pennsylvania Gazette*, Franklin’s *Apology* contended that “Printers are educated in the Belief that when Men differ in opinion, both Sides ought equally to have the Advantage of being heard by the Publick.”⁷⁷

To Franklin, even those “opinions” in advertisements should be “heard by the Publick.” Thus, America’s first sustained defense of a free press, and of the very notion of a “marketplace of ideas,” came in response to an attack on a classic example of commercial speech.

C. Colonial and Post-Revolutionary Regulations on Speech

1. The Stamp Acts—Free Commercial Speech as a Revolutionary Impetus

Given the eighteenth-century equation of liberty and property, printers who published advertising-laden newspapers were generally understood to be exercising the natural right to control their property. Indeed, one of the major precipitating events of the American Revolution involved a defense of advertisements. Much of the opposition to the British Stamp Act of 1765 and the taxes it imposed on the press was based on their perceived offense to property rights—as well as to freedom of the press.⁷⁸

The Stamp Act assessed a half-penny tax on each copy of newspaper printed on what was called “half a sheet”; a penny was assessed on the next larger size.⁷⁹ The Act then added 2 shillings for each advertisement. As Arthur Schlesinger, Sr. writes, “[B]y any standard [this amount] was excessive, since the publisher himself received only from 3 to 5s. and still less for repeated insertions.”⁸⁰ This tax galvanized the colonial press

⁷⁶ S. Botein, *Printers and the American Revolution*, in *THE PRESS AND THE AMERICAN REVOLUTION* 20 (B. Bailyn & J.B. Hench eds., 1980).

⁷⁷ *An Apology for Printers*, reprinted in *WRITINGS OF BENJAMIN FRANKLIN*, *supra* note 75, at 174.

⁷⁸ See Middleton, *supra* note 53, at 280-81.

⁷⁹ See ARTHUR SCHLESINGER, SR., *PRELUDE TO INDEPENDENCE: THE NEWSPAPER WAR ON BRITAIN 1764-1776*, at 68 (1966).

⁸⁰ *Id.*

against the British government, leading one commentator of the day to note, "Stamp duties also, imposed on every *commercial* instrument of writing—on *literary productions*, and, *particularly*, on *newspapers*, which of course, will be a great discouragement to *trade*; an obstruction to *useful knowledge* in *arts, sciences, agriculture, and manufactures*; and a prevention of *political information* throughout the states."⁸¹

The opposition of newspapers to the Stamp Act of 1765 was based largely, if not primarily, on their concern that it encroached on the freedom of expression.⁸² In reacting to the Stamp Act, the Town of Worcester directed its representatives in the Massachusetts Assembly to "take special care of the LIBERTY OF THE PRESS."⁸³ The *Connecticut Gazette* enjoined its readers that "[t]he press is the test of truth, the bulwark of public safety, the guardian of freedom, and the people ought not to sacrifice it."⁸⁴ The *New York Gazette or Weekly Post-Boy* flaunted the motto: "The United Voice of all His Majesty's *free* and *loyal* subjects in America—LIBERTY, PROPERTY, and *no* STAMPS."⁸⁵ According to Presbrey, the repeal of the Stamp Act of 1765 one year after it had been enacted "was a powerful victory for an independent press and for advertising."⁸⁶

After the Revolution, and only five years after adopting a state constitution explicitly guaranteeing freedom of the press,⁸⁷ Massachusetts enacted a similar stamp tax on all newspapers and almanacs.⁸⁸ This act was followed by a tax on newspaper advertisements.⁸⁹ These taxes were widely denounced both within and outside of the state as, in printer Isaiah Thomas's words, an "unconstitutional restraint on the Liberty of the Press."⁹⁰ Repeal of the advertising tax in 1786 was also cited as a triumph for freedom of the press.⁹¹

81 *Objections by A Son of Liberty*, NEW YORK J., Nov. 8, 1787, reprinted in 6 THE COMPLETE ANTI-FEDERALIST 34, 36 (Herbert J. Storing ed. 1981).

82 See SCHLESINGER, *supra* note 79, at 70-82.

83 *Id.* at 70.

84 CONN. GAZETTE, *quoted in id.*

85 N.Y. GAZETTE or WKLY POST-BOY, Nov. 7, 1765, *quoted in id.* at 77.

86 PRESBREY, *supra* note 57, at 151.

87 See DECLARATION OF RIGHTS para. XVI (Mass. 1780).

88 See Neisser, *supra* note 48, at 264 (citing CLYDE A. DUNIWAY, THE DEVELOPMENT OF FREEDOM OF THE PRESS IN MASSACHUSETTS 136 (1966)).

89 See *id.*

90 Isaiah Thomas, ESSEX J., Apr. 19, 1786, and MASS. GAZETTE, Apr. 24, 1786, *quoted in* Carol S. Humphrey, "That Bulwark of Our Liberties": Massachusetts Printers and the Issue of a Free Press, 1783-1788, 14 JOURNALISM HIST. 34, 37 (1987).

91 See *id.*; see also Grosjean v. American Press Co., 297 U.S. 233, 248 (1936) (noting that the then recent Massachusetts episode played a part in the Framers' adoption of the First Amendment).

2. State Regulation of Commercial Speech at the Time of the Framing

Early Americans were not only hostile to taxes imposing upon commercial speech; they also appear to have been averse to *any* government regulation on the advertising of legal products. The practices of state legislatures around the time the First Amendment was ratified further support this Article’s conclusion that the generation of the Framers did not distinguish between the constitutional status of commercial and noncommercial speech.⁹² A thorough review of the state codes at that time indicates that states, in fact, did not restrict commercial messages about lawful products or services.⁹³ Rather, consistent with the constitutions of the ten states that explicitly protected the freedom of the press,⁹⁴ advertising was limited only when used to promote products, services, or activities that were themselves unlawful.

Although much trade regulation existed at the time of the Framing, there were apparently no restrictions on the advertising of lawful activities.

92 Article I of the Constitution delegated limited powers to the federal government; all other powers were reserved to the people and the states. U.S. CONST. amends. IX, X. The First Amendment explicitly limited Congress’s authority over speech and the press. As such, it is unlikely that the federal government was granted greater power to restrict speech than existed in the states. It is therefore instructive to examine state legislative and constitutional authority to assess the limits of the power delegated to Congress. The fact that, as discussed below, state legislatures did not regulate truthful advertising of lawful products and services suggests, at a minimum, that such a power was not delegated to the federal government. The lack of such regulation, although not dispositive, also suggests that advertising was regarded as within “the freedom of speech and of the press” protected by many state constitutions.

93 This conclusion rests upon a review of the compilations of ratification-era statutes for each state closest in date to 1791. THE PUBLIC STATUTE LAWS OF THE STATE OF CONNECTICUT (1808); LAWS OF MARYLAND (1811); THE LAWS OF THE COMMONWEALTH OF MASSACHUSETTS FROM NOVEMBER 28, 1780 TO FEBRUARY 23, 1807 (1807); THE LAWS OF THE STATE OF NEW HAMPSHIRE (1797); THE LAWS OF THE STATE OF NEW JERSEY (1800); LAWS OF THE STATE OF NEW YORK (1802); THE PUBLIC ACTS OF THE GENERAL ASSEMBLY OF NORTH CAROLINA (1804); DIGEST OF THE ACTS OF THE GENERAL ASSEMBLY OF PENNSYLVANIA (1841); THE PUBLIC LAWS OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS (1798); THE PUBLIC LAW OF THE STATE OF SOUTH CAROLINA (1790); LAWS OF THE STATE OF VERMONT (1797); COLLECTION OF ALL SUCH ACTS OF THE GENERAL ASSEMBLY OF VIRGINIA (1803). All compilations are available at The Edward Bennett Williams Law Library, Georgetown University Law Center. Contemporaneous compilations for Delaware and Georgia were unavailable.

94 DECLARATION OF RIGHTS para. 23 (Del. 1776); GA. CONST. OF 1798 art. IV, § V; DECLARATION OF RIGHTS para. 38 (Md. 1776); DECLARATION OF RIGHTS para. XVI (Mass. 1780); BILL OF RIGHTS art. 22 (N.H. 1783); DECLARATION OF RIGHTS para. 25 (N.C. 1776); DECLARATION OF RIGHTS para. 12 (Pa. 1776); DECLARATION OF RIGHTS § 7 (S.C. 1778); DECLARATION OF RIGHTS ch. I, art. XIII (Vt. 1793); DECLARATION OF RIGHTS para. 12 (Va. 1776). Two of those states—Pennsylvania and Vermont—connected that provision to protection for freedom of speech. See generally David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 MD. L. REV. 429, 441 n.55 (1983). Of the remaining four states in existence when the Bill of Rights was ratified, two—Rhode Island and Connecticut—had not drafted state constitutions; two others—New York and New Jersey—did not provide specific state constitutional guarantees of freedom of press and speech. See LEONARD A. LEVY, *EMERGENCE OF A FREE PRESS* 189 (1985).

Early statutes show efforts to regulate merchants and shopkeepers,⁹⁵ liquor and taverns,⁹⁶ potash,⁹⁷ malt,⁹⁸ a variety of commodities,⁹⁹ attorneys,¹⁰⁰ and doctors.¹⁰¹ Among other things, these statutes required licenses, prevented charging of "unreasonable prices," and set standards for inspection and weighing of commodities. The statutes surveyed, however, reveal no restrictions on the right of these regulated industries to advertise lawful products and services. Sellers were left to their own creativity in seeking to attract attention to their wares. And buyers were protected against potentially false or misleading claims by the common law, tempered by the doctrine of *caveat emptor*—let the buyer beware.¹⁰²

The sole limitations placed on advertising restricted the promotion of certain prohibited activities. For example, during the period surrounding the ratification of the Bill of Rights, numerous states prohibited or restricted lotteries. Several statutes that barred or restricted lotteries specifically prohibited their advertisement and promotion.¹⁰³ New Jersey,

95 See, e.g., Act for Punishing and Preventing Oppression, 1635 (amended 1730), THE PUBLIC STATUTE LAWS OF CONNECTICUT 544 (1808).

96 See, e.g., Act Regulating Licensed Houses, 1791, THE LAWS OF THE STATE OF NEW HAMPSHIRE 373-76 (1797); Act to Lay A Duty on Strong Liquors, and For Regulating Inns and Taverns, 1801, LAWS OF THE STATE OF NEW YORK 439-43 (1802); Act for Regulating Ordinaries, Houses of Entertainment and Retailers of Spirituous Liquors, 1798, THE PUBLIC ACTS OF THE GENERAL ASSEMBLY OF NORTH CAROLINA 122-23 (1804).

97 See, e.g., Act to Regulate the Exportation of Potash and Pearl Ash, 1792, THE LAWS OF MARYLAND 191-92 (1811); Act to Regulate Flax-Feed, Pot-ash and Pearl Ash for Exportation, 1785, THE LAWS OF THE STATE OF NEW HAMPSHIRE 377-79 (1797).

98 See, e.g., Act for the Better Making and Measuring of Malt, 1700, THE LAWS OF THE COMMONWEALTH OF MASSACHUSETTS 186 (1807).

99 See, e.g., Act for Regulating the Exportation of Tobacco and Butter, and the Weight of Onions in Bunches, and the Size of Lime-Casks, 1785, THE LAWS OF THE COMMONWEALTH OF MASSACHUSETTS 320-23 (1807); Act to Prevent Frauds and Deceits in Selling Rice, Pitch, Tar, Rosin, Turpentine, Beef, Pork, Shingles, Stoves and Fire-wood, and to Regulate the Weighing of the Merchandise in this Province, 1746, THE PUBLIC LAW OF THE STATE OF SOUTH CAROLINA 208-10 (1790).

100 See, e.g., Act Regulating the Admission of Attornies, 1785, THE LAWS OF THE COMMONWEALTH OF MASSACHUSETTS 318-19 (1785).

101 See, e.g., Act to Regulate the Practice of Physic and Surgery, 1783, LAWS OF THE STATE OF NEW JERSEY 7-8 (1783).

102 See, e.g., *Borrekins v. Bevan*, 3 Rawle 23, 37 (Pa. 1831) ("A sample, or description in a sale note, advertisement, bill of parcels, or invoice, is equivalent to an express warranty, that the goods are what they are described"). See generally Walton H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L. REV. 1133 (1931).

103 See, e.g., Act for the Prevention of Lotteries, 1792, THE LAWS OF MARYLAND 189-90 (1811) (prohibiting lotteries, as well as their "propos[al] to the public," absent permission of the legislature); Act for the Suppression of Lotteries, 1785, THE LAWS OF THE COMMONWEALTH OF MASSACHUSETTS 252-53 (1807) (providing separate fines for setting up lottery and "aiding and assisting in any such lottery, by printing, writing, or in any other manner publishing an account thereof, or where the tickets may be had"); Act for the Suppressing of Lotteries, 1791, THE LAWS OF THE STATE OF NEW HAMPSHIRE 339 (1805) (separate penalties for setting up a lottery and "aiding or assisting . . . by printing, or any other ways publishing an account thereof," except as established by the state of Congress); Act to Prevent Private Lotteries, to remit certain Penalties, and to Repeal the Acts therein Mentioned, 1783, LAWS OF THE STATE OF NEW YORK 35-38 (1802) (providing penalties for being in "any ways concerned" with lotteries not authorized by the state, including "printing,

for example, enacted a statute in 1797 declaring that, except for lotteries established under the authority of the United States or the New Jersey legislature, "all lotteries for money, goods, wares . . . or other matters or things whatsoever, shall be, and hereby are adjudged to be common and public nuisances."¹⁰⁴ With respect to unauthorized—and therefore illegal—lotteries, the act imposed separate penalties on those who "make or draw" such lotteries, as well as those who print, write or publish any account of where tickets are available, or who "expose to public view, any . . . advertisement or advertisements of or concerning such lottery."¹⁰⁵ Only Pennsylvania completely outlawed lotteries (and their advertisement).¹⁰⁶

A handful of states prevented the advertisement of other illegal activities. For example, Connecticut and Pennsylvania prohibited the staging—and advertising—of horse racing.¹⁰⁷ And Rhode Island prohibited the erection of a sign "for the keeping of a public house" without first obtaining an innkeeper's license.¹⁰⁸

In fact, a review of statutes existing at the time of the Framing demonstrates not only that state legislatures were not hostile to commercial speech, but also that they were aware of advertising and its potential usefulness. On certain occasions, state legislatures *required* advertising as a means of disseminating information necessary to protect the property or legal rights of others.¹⁰⁹ The state legislatures, therefore, were not opposed to advertising in general; that advertising was a tool employed by the state legislatures indicates that they appreciated its value.

writing, or any other ways publishing an account thereof"); Act for Suppressing and Preventing of Private Lotteries, 1762, THE PUBLIC LAW OF THE STATE OF SOUTH CAROLINA 256-67 (1790) (fining anyone "who shall make, writ, print or publish, or cause to be written or published, any scheme or proposal" for a private lottery).

¹⁰⁴ Act of Feb. 13, § 1, 1797, THE LAWS OF THE STATE OF NEW JERSEY 227-28 (1800).

¹⁰⁵ *Id.* § 3.

¹⁰⁶ See Act for the More Effectual Suppressing and Preventing of Lotteries, 1762, A DIGEST OF THE ACTS OF THE GENERAL ASSEMBLY OF PENNSYLVANIA 584-85 (1841) (setting 20£ fine for, *inter alia*, advertising or causing to be advertised any lottery).

¹⁰⁷ See Act to Prevent Horse Racing, 1803, THE PUBLIC STATUTE LAWS OF THE STATE OF CONNECTICUT 381-82 (1808); Act Against Horse Racing, 1820, A DIGEST OF THE ACTS OF THE GENERAL ASSEMBLY OF PENNSYLVANIA 450-51 (1841).

¹⁰⁸ See Act Enabling the Town-Councils of Each Town In This State to Grant Licenses for Retailing Strong Liquors, and to Prevent the Selling of the Same without License, and against the Keeping of Signs at Unlicensed Houses, 1728, THE PUBLIC LAWS OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS 391-94 (1798).

¹⁰⁹ See, e.g., Act for Amending, and Reducing into System, the Laws and Regulations Concerning Last Wills and Testaments, the Duties of executors, Administrators and Guardians, and the Rights of Orphans and Other Representatives of Deceased Persons, 1798, LAWS OF MARYLAND 457-60 (1811) (executors of estates were not liable for claims made after one year, if they inserted an advertisement announcing the estate in newspapers designated by the Orphans' Court); Act Relating to Deserters, 1741, PUBLIC ACTS OF THE GENERAL ASSEMBLY OF NORTH CAROLINA 64 (1804) (requiring the jailer of a runaway slave to advertise, at the cost of the rightful owner, in the *Virginia* or *South Carolina Gazette*).

3. Common Law Exceptions to Free Commercial Speech: Fraud, Libel, and Solicitation

Although the evidence in the preceding section strongly suggests that advertising was within the freedom of the press meant to be protected by the First Amendment, a key qualification must be made to this statement. The First Amendment was adopted against the background of a venerable common law tradition prohibiting commercial misrepresentation. In the words of Sir William Blackstone, "[E]very kind of fraud is equally cognizable . . . in a court of law."¹¹⁰ Thus, false or misleading commercial speech is clearly not entitled to First Amendment protection.¹¹¹

Justice Joseph Story's treatise *Equity Jurisprudence* addressed that "old head of equity," the law of misrepresentation, in great detail.¹¹² He described the basic rule as follows:

Where the party intentionally, or by design, misrepresents a material fact, or produces a false impression, in order to mislead another, or to entrap or to cheat him, or to obtain an undue advantage of him; in every sense there is a positive fraud in the truest sense of the terms; there is an evil act with evil intent And the misrepresentation may be as well by deeds or acts, as by words; by artifices to mislead, as well as by positive assertions.¹¹³

That liability could accompany this category of speech demonstrates that it was outside the bounds of speech that the Framing generation deemed deserving of constitutional protection.

In further support of this exception, there is little evidence that demonstrably false speech was considered to be within "the freedom of speech" contemplated by those who ratified the First Amendment. To the contrary, a proposed draft of the First Amendment by Thomas Jefferson shows that the free press envisioned by the Framers did not encompass the publication of falsehoods—commercial or noncommercial: "The people shall not be deprived or abridged of their right to speak or to write or otherwise to publish any thing but false facts affecting injuriously the life, liberty, property or reputation of others or affecting the peace of the confederacy with foreign nations."¹¹⁴ This view accords with the

¹¹⁰ 3 WILLIAM BLACKSTONE COMMENTARIES *431.

¹¹¹ See, e.g., *Friedman v. Rogers*, 440 U.S. 1, 8 (1979). See also WILLIAM F. WALSH, A HISTORY OF ANGLO-AMERICAN LAW 328-29 (1932) (tracing the development of action of deceit from mid-fourteenth century).

¹¹² JOSEPH STORY, EQUITY JURISPRUDENCE § 192 (1836).

¹¹³ *Id.*

¹¹⁴ 15 THE PAPERS OF THOMAS JEFFERSON 367, 367 (J. Boyd ed., 1958); see also David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 MD. L. REV. 429, 440 n.52 (1983) (discussing

prevailing and long-standing common law notions discussed above.

For similar reasons—namely, that freedom of speech must be understood against the common-law background existing at the time of the First Amendment’s ratification—advertisements of unlawful products must also be regarded as outside the scope of constitutional protection. According to Blackstone’s *Commentaries on the Laws of England*, the common law considered it a criminal offense to “procure, counsel, or command another to commit a crime.”¹¹⁵ As noted by a seminal British case of the time, “A solicitation or inciting of another, by whatever means it is attempted, is an act done; and that such an act done with a criminal intent is punishable by indictment has been clearly established by . . . several cases.”¹¹⁶ Thus, advertising unlawful products could be prohibited at common law because such a message is, in essence, an invitation to commit a crime, and—like speech conveying false information—ought therefore be understood as an exception to the First Amendment protection afforded to commercial speech.

D. *Assessment of the Evidence*

The evidence put forth in this Part presents great difficulties for those who would suggest that colonial Americans in any way considered commercial speech to be “low value.” At the outset, as noted in the Introduction, the text of the First Amendment does not distinguish between commercial and noncommercial speech. Furthermore, nothing in the Framers’ philosophical worldview justifies drawing a distinction between “economic” and “civil” rights; to the contrary, leading American Founders, including James Madison, understood the protection of property to be the central purpose of free government. The evidence above also shows that the Framing generation’s commitment to commercial speech was not merely an abstract one; the historical experience of Franklin’s defense of his handbill and the attacks on the Stamp Acts indicate a willingness, particularly on the part of printer-revolutionaries, to defend advertising with the same ardor, and employ the same arguments, that they mustered in fighting off other attacks on the freedom of the press. Perhaps most convincingly, it appears that commercial speech was inseparable from the very *idea* of a free American press. Advertising not only provided the revenues for colonial newspapers, but contained substantive commercial information that was at least as eagerly valued as news by many readers. In accordance with this Article’s conclusion about the importance of commercial speech to early Americans, the only restrictions

Jefferson’s proposed draft of the First Amendment).

115 4 BLACKSTONE, *supra* note 110, at *36.

116 *The King v. Higgins*, 102 Eng. Rep. 269, 276 (K.B. 1801).

on advertising apparently extant during the colonial era were those promoting products already made illegal by state legislatures.

The understanding of the First Amendment that is compelled by this historical evidence is both broader and narrower than the view we take today. It is broader in that it would extend full First Amendment protections to commercial communications; it is narrower in that it would exclude all demonstrably false speech that causes identifiable harm to individuals.¹¹⁷ The fact that "demonstrably false" speech was not understood by the Framing generation to be constitutionally protected would not, however, threaten political speech; unlike speech that can objectively be *shown* to be false (such as fraud, libel, and transferal of false scientific information), speech advancing political ideas and opinions cannot be proven false.¹¹⁸ Thus, there should not be, as the Supreme Court now holds, a "distinction between commercial and noncommercial speech."¹¹⁹ Rather, the distinction should be drawn between demonstrably false speech (including commercial speech, which can be regulated to ensure its truthfulness) and speech that is not amenable to a demonstration of falsity, such as speech about political ideas.¹²⁰

117 There is, however, considerable support in Supreme Court precedent for the argument that deliberate falsehoods are not protected by the Constitution. The Court said in *Garrison v. Louisiana*:

The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration. . . . [T]he use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality" Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

379 U.S. 64, 75 (1964) (citations omitted); see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) ("[T]here is no constitutional value in false statement of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues.").

118 See ZECHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* (1951); Judith Schenk Koffler & Bennett L. Gershman, *The New Seditious Libel*, 69 CORNELL L. REV. 816 (1984).

119 *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 522 (1981) (Brennan, J., concurring).

120 As Justice Stevens recently noted, "[i]n the commercial context, . . . government is not only permitted to prohibit misleading speech that would be protected in other contexts, . . . but it often requires affirmative disclosures that the speaker might not make voluntarily." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 492 (1995) (Stevens, J., concurring) (citation omitted). Compare 44 *Liquormart v. Rhode Island*, 517 U.S. 484, 501 (1996) ("When a state regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, or requires the disclosure of beneficial consumer information, the purpose of its regulation is consistent with the reasons for

II. Regulation of Commercial Speech During the Civil War Era

This Part shows that the robust tradition of American commercial speech discussed in Part I continued and expanded through the Civil War and the ratification of the Fourteenth Amendment, and that there is no evidence suggesting that commercial speech was considered to be “low value” at that time. On the contrary, an examination of state legislative practices at and around the time of the Fourteenth Amendment’s ratification reveals that—to the degree that advertising was regulated at all—states continued to focus their regulatory efforts on limiting advertising for illegal products and services.¹²¹ Furthermore, the limited Supreme Court jurisprudence on commercial speech during this period does not suggest that commercial and noncommercial speech were understood to be afforded differing degrees of constitutional protection.

Adherents to purely “originalist” theories of constitutional interpretation may find this evidence irrelevant, and consider the matter settled after an assessment of the understanding of those who drafted and ratified the First Amendment. However, there is reason to believe that Reconstruction-era history can illuminate even an originalist inquiry into the meaning of free speech. Like most of the provisions of the Bill of Rights, the First Amendment originally constrained only the federal government, stating that “*Congress shall make no law*” abridging speech or press.¹²² Today, however, most of the provisions of the Bill of Rights—including the First Amendment—are considered by the Supreme Court to have been “incorporated” against the states through the Fourteenth Amendment, and now are understood as constraints on the exercise of power by state and local governments as well.¹²³ Accordingly, even originalist jurists like Justice Scalia have found Reconstruction-era legislative practices relevant to an inquiry into the extent of constitutional

according constitutional protection to commercial speech and therefore justifies less than strict review.”) (Stevens, Kennedy, & Ginsburg, JJ., concurring) *with Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974) (“Under the First Amendment there is no such thing as a false idea.”).

121 This conclusion rests upon an examination of all state codes published closest to 1868. For states with less frequently published codes, the last code published before 1868 and the first one published after 1868 were examined to determine the state of the law at the time of incorporation. The Territorial Codes of Utah, Washington, Wyoming, and New Mexico were also examined. The State Code of Wisconsin could not found, but the codes of the other thirty-seven states admitted to the union by 1880 were examined. See INFORMATION PLEASE ALMANAC 748-82 (Otto Johnson ed., 49th ed. 1996).

122 U.S. CONST. amend. I (emphasis added).

123 See, e.g., *Malloy v. Hogan*, 378 U.S. 1 (1964) (applying Fifth Amendment privilege against self incrimination against the states); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (applying Sixth Amendment right to counsel against the states); *Mapp v. Ohio*, 367 U.S. 643 (1961) (applying Fourth Amendment right to be free from unreasonable searches and seizures against the states); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (applying First Amendment right to the free exercise of religion against the states). See also Akhil Reed Amar, *Did The Fourteenth Amendment Incorporate The Bill of Rights Against States?*, 19 HARV. J.L. & PUB. POL’Y 443 (1996).

protection afforded commercial speech.¹²⁴ Furthermore, some scholars have recently suggested that the Fourteenth Amendment should be understood not only as procedurally incorporating provisions of the Bill of Rights against the states, but as substantively changing the content of those provisions as well.¹²⁵ In response to such potential objections to my originalist conclusions set forth in Part I—and, furthermore, as a matter of general historical interest—this Part sets forth the tradition of commercial speech leading up to the Reconstruction Amendments.

A. *The State of Advertising During the Reconstruction Era*

Historian James Playsted Wood notes that advertising was “vigorous and thriving by the mid-nineteenth-century mark.”¹²⁶ In 1847, one publisher stated that advertising had a news-like quality that had as much appeal to readers as did reporting on the day’s events.¹²⁷ To illustrate, a typical issue of the *New York Herald* in 1860 carried thousands of small-space advertisements. Like many of its colonial counterparts, its front page bore no editorial matter, only advertising.¹²⁸ Only the intense interest in the Civil War supplanted advertising as the front-page material in most papers.¹²⁹ Nonetheless, even in 1869, the *New York Herald* typically held eight columns of editorial comment, thirty-eight columns of news, and fifty columns of advertising.¹³⁰

Although interest in the Civil War may have pushed advertising from the front page, the demonstrated ability of advertising to sell Union war bonds led to a vast expansion of advertising’s use.¹³¹ A year after the close of the Civil War:

Every rock with surface broad enough, and facing in a direction from which it could be seen, and every cliff which some adventurous painter had been able to climb was daubed over with signs. Every fence, every unoccupied building, the boardings around every large construction site, even the New York curbstones, shouted advertising messages. Fences along the highways and railroad rights of way wore advertising in letters

124 See, e.g., 44 *Liquormart v. Rhode Island*, 517 U.S. 484, 517 (1996) (Scalia, J., concurring) (identifying as highly relevant to commercial speech inquiry the “state legislative practices at the time the Fourteenth Amendment was adopted, since it is most improbable that that adoption was meant to overturn any national consensus regarding free speech”).

125 The leading exponent of this position is Akhil Amar. See AKHIL REED AMAR, *THE BILL OF RIGHTS* (1998).

126 WOOD, *supra* note 51, at 158.

127 See *id.* at 159-60.

128 See *id.* at 166-67; MOTT, *supra* note 56, at 397-98, 593-94.

129 See MOTT, *supra* note 56, at 397; PRESBREY, *supra* note 57, at 259.

130 See WOOD, *supra* note 51, at 169.

131 See PRESBREY, *supra* note 57, at 253.

from six inches to two feet high. Bridges, especially covered bridges, bore huge advertising signs.¹³²

Advertising's prominence also led to other innovations including the first advertising agent in 1841,¹³³ the first newspaper directory in 1869,¹³⁴ and the first market survey in 1879.¹³⁵ George Wakeman, writing in *Galaxy* magazine in 1867, described advertising in the United States as having arrived at the point at which

the names of successful advertisers have become household words where great poets, politicians, philosophers and warriors of the land are as yet unheard of; there is instant recognition of Higg's saleratus and Wigg's soap even where the title of Tennyson's last work is thought to be "In the Garden" and Longfellow understood as the nickname of a tall man.¹³⁶

Advertising had become a major part of American culture.

B. *State Regulation of Advertising and the Press During Reconstruction*

Even as advertising emerged as an increasingly powerful social force, state governments allowed it to grow unchecked, restricting only the promotion of illegal products and services.¹³⁷ The restrictions on advertising that did exist were aimed at the illegality of the advertised conduct, rather than at advertising itself. For example, Delaware barred advertising by unlicensed lottery retailers.¹³⁸ Similarly, Vermont barred "the advertising of lotteries not granted by the legislature of this state, or of the United States."¹³⁹ Significantly, the products, services, or activities that could not be advertised in the Reconstruction era were prohibited in their entirety (e.g., unlicensed innkeeping, illegal horse racing, and lotteries). Such activities, when lawful, could be advertised.

132 WOOD, *supra* note 51, at 182; *see also* PRESBREY, *supra* note 57, at 255.

133 *See* G. ALLEN FOSTER, ADVERTISING: ANCIENT MARKET PLACE TO TELEVISION 48-49 (1967).

134 *See* WOOD, *supra* note 51, at 142.

135 *See* FOSTER, *supra* note 133, at 126-31.

136 PRESBREY, *supra* note 57, at 255.

137 For example, a number of states continued to restrict lottery advertising. *See, e.g.*, CAL. PENAL CODE, § 323 (1872); CONN. GEN. STAT. tit. 12, § 150 (1866); DEL. REV. STAT. chap. 98, v. 12, § 6 (1874); DIGEST OF LAWS OF FLA. ch. 80, § 4 (1881); IOWA CODE, § 4043 (1873); COMPILED LAWS OF KAN. ch. 31, § 342 (1885); KY. REV. STAT. ch. 28, art. 21, § 4 (1860 & Supp. 1866); ME. REV. STAT. tit. 11, ch. 128, § 13 (1884); MD. CODE art. 30, § 114 (1860); MISS. REV. CODE, § 2605 (1871); COMPILED LAWS OF NEV. § 2498 (1873); N.Y. REV. STAT., ch. 20, tit. 8, § 53 (1875); OREGON GEN. LAWS, Crim. Code, ch. 8, § 661 (1874); COMPILED LAWS OF THE TERRITORY OF UTAH § 2002 (1876); VT. GEN. STAT. ch. 119, § 7 (1870).

138 *See* DEL. REV. STAT., ch. 98, v. 12, § 6 (1874).

139 VT. STAT., tit. 34, ch. 119, § 7 (1870).

Also during this time, in response to an aggressive anti-abortion campaign beginning in the 1840s,¹⁴⁰ many states adopted extensive abortion restrictions, which were accompanied by limits on the right to advertise abortion services. One such restriction, for example, imposed penalties on "[e]very person, who shall, by publication, lecture . . . or by advertisement, or the sale or circulation of any publication, encourage or prompt the commission of [a miscarriage]."¹⁴¹ These limits on abortion advertising applied with equal force to all speech advocating abortion, commercial or noncommercial. Other illegal products or activities that could not be advertised included prize fights¹⁴² and obscene books.¹⁴³ Similarly, West Virginia, New York, and Kansas, like their modern counterparts, barred obscene advertising.¹⁴⁴

The most prevalent state legislative interaction with advertising during the Reconstruction era was in the mandatory use of advertising to give legal notice. For example, state codes required notice via advertising for executors sale,¹⁴⁵ partitions of land,¹⁴⁶ limited partnerships,¹⁴⁷ liens,¹⁴⁸ and even impounded beasts.¹⁴⁹ Eighteen of thirty-eight states examined in this period required some type of advertising as a form of legal notice.¹⁵⁰

The prevalence of advertising actually led to state protection of the property interests of advertisers, through statutes prohibiting the unauthorized removal of advertising.¹⁵¹ States also sought to prevent

140 See JAMES C. MOHR, ABORTION IN AMERICA 147-70 (1978).

141 CONN. GEN. STAT., tit. 12, ch. 2, § 25 (1866); see also CAL. PENAL CODE § 317 (1872); DIGEST OF LAWS OF FLA. ch. 59, § 10 (1881); COMPILED LAWS OF KAN. ch. 31, § 342 (1885); MD. LAWS ch.179 § 2 (1868); MASS. GEN. STAT. ch. 165, § 10 (1860); N.J. REV. STAT. Crimes, § 44 (1874); N.Y. REV. STAT. pt. 4, ch. 1, tit. 6, § 78 (1875); OHIO REV. STAT. ch. 2732, §1 (1860 & Supp.); R.I. GEN. STAT. ch. 232, § 23 (1872); COMPILED LAWS OF THE TERRITORY OF UTAH, Penal Code tit. 9, ch. 8 § 162 (4) (1876).

142 See COMPILED LAWS OF KAN. ch. 31, § 338 (1885).

143 See CAL. PENAL CODE § 311(4) (1872); COMPILED LAWS OF THE TERRITORY OF UTAH, Penal Code tit. 9, ch. 8, § 162(4) (1876).

144 See COMPILED LAWS OF KAN., ch. 31, § 342 (1885); N.Y. REV. STAT. pt. 4, ch. I, tit. 6, § 77 (1875); W. VA. CODE ch. 149, § 11 (1868).

145 See COMPILED LAWS OF ALA. § 2070 (1867); GA. CODE § 3649-50 (1873); ILL. REV. STAT. ch. 77, § 12 (1874); KY. REV. STAT. ch. 36, art. 13, § 2(2) (1860); NEB. REV. STAT pt. 2 § 490 (1866); DIGEST OF LAWS OF PENN., Execution § 78 (1872).

146 See COMPILED LAWS OF ALA. § 3110 (1867); COLO. REV. STAT. ch. 67, § 6 (1868).

147 See ME. REV. STAT. ch. 33, § 5 (1884); DIGEST OF LAWS OF PENN., Limited Partnerships § 9 (1872).

148 See COLO. REV. STAT. ch. 54, § 5 (1868).

149 See ME. REV. STAT. ch. 23, § 12 (1884).

150 See COMPILED LAWS OF ALA. (1867); DIGEST OF LAWS OF ARK. (1874); COLO. REV. STAT. (1868); GA. CODE (1873); ILL. STAT. (1872); IND. STAT. (Supp. 1875); IOWA CODE (1873); KY. REV. STAT. (1860 & Supp. 1866); LA. CODE (1867); ME. REV. STAT. (1871); MD. CODE (1860 & Supp. 1868); MASS. GEN. STAT. (1860 & Supp. 1870); NEB. REV. STAT. (1866); N.H. GEN. STAT. (1867); N.Y. REV. STAT. (1875); OHIO REV. STAT. (Supp. 1868); DIGEST OF LAWS OF PENN. (1873); S.C. REV. STAT. (1873).

151 See, e.g., KY. REV. STAT. ch. 28 amend., § 1 (1860); NEB. REV. STAT. pt. 3, ch. 12, § 144 (1866); N.H. GEN. STAT. ch. 263, § 10 (1867).

advertisers from trespassing on the property rights of other citizens by penalizing the placement of advertising in unauthorized locations.¹⁵² There was no record of legislation barring false and misleading advertising of lawful products and services during this period, and no record of advertising regulations serving other purposes.

Nonetheless, as advertising increased, so too did the recognition that, if false, advertisements could cause harm. Thus, beginning around 1864, certain more successful newspapers refused to accept advertisements for questionable patent medicines and quacks.¹⁵³ Indeed, many papers warned their readers against these disreputable advertisers, and in 1872, the national government enacted regulations aimed at restricting the dissemination of fraudulent advertisements through the mail.¹⁵⁴

C. *Advertising in the Supreme Court During the Post-Civil War Era*

The Supreme Court did not decide any cases relating to advertising before the Civil War. To the extent that the Supreme Court addressed issues relating to advertising during Reconstruction, its decisions were consistent with the view that advertising was no different than other forms of speech. To illustrate, in *Ex parte Jackson*¹⁵⁵ the Court held that Congress’s 1868 ban on the advertising of lotteries by mail did not violate the First Amendment. The opinion dealt not with any distinction between commercial and noncommercial messages, but rather with Congress’s power over the postal system, stating that “[t]he right to designate what shall be carried necessarily involves the right to determine what shall be excluded.”¹⁵⁶ Thus, according to Judge Alex Kozinski and Stuart Banner, the Court “[c]onsidered advertising (or at least printed circulars advertising lotteries) to be speech entitled to the same degree of First Amendment protection as any other.”¹⁵⁷

¹⁵² See, e.g., ME. REV. STAT. ch. 127, § 10 (1884); MASS. GEN. STAT. ch. 349 (1860 & Supp. 1877); R.I. GEN. STAT. ch. 230, § 31 (1872).

¹⁵³ See WOOD, *supra* note 51 at 181.

¹⁵⁴ See Act of June 8, 1872, ch. 335, 17 Stat. 283 (codified at 39 U.S.C. § 3005 (1994)) (authorizing the Postmaster General, after a hearing, to issue a Fraud Order directing the local postmaster to cease delivering mail or paying postal money orders addressed to a merchant determined fraudulently to have obtained money or property through the mail).

¹⁵⁵ 96 U.S. 727 (1877).

¹⁵⁶ *Id.* at 732.

¹⁵⁷ Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747, 765 (1993).

III. Regulation of Commercial Speech During the First Half of the Twentieth Century

This Part explains how commercial speech came to be regarded, by the end of the first half of the twentieth century, as outside the bounds of the First Amendment. Advertising continued to proliferate during the first few decades of the twentieth century. As the Gilded Age gave way to the Progressive Era, however, disenchantment with unfettered capitalism also grew.¹⁵⁸ Supreme Court constitutional jurisprudence in the late nineteenth and early twentieth centuries was marked by hostility to social welfare legislation—particularly labor laws—based on the belief that it infringed on natural rights of contract and property. This philosophy was embodied in *Lochner v. New York*,¹⁵⁹ decided in 1905, in which the Court struck down a state law that placed a 60-hour limit on a bakery employee's work week.

However, the notion that "civil" liberties were different from property rights and economic liberties soon began to take hold in the culture.¹⁶⁰ Furthermore, during the 1920s, the Court began to apply the First Amendment to the states, raising for the first time the question of whether it protected advertising. These events culminated in the ultimate schism between commercial and noncommercial speech that still persists in the Court's jurisprudence today.

The Great Depression made people look at advertising differently. Disenchantment with advertising, as with the entire capitalist system, swelled. This cultural change had a profound effect on the Supreme Court, which essentially stopped protecting economic rights. It was at this point, in 1942, when the Court first addressed whether advertising was protected by the First Amendment. Consistent with the new thinking of the Court headed by Chief Justice Stone, the justices held that advertising was not protected at all.¹⁶¹

A. *Growth of Advertising and Reform Movements During the Early Twentieth Century*

Advertising's growth was marked by a professionalization of the industry. By 1898, a survey by the *Press and Printer* of Boston counted 2,583 companies that advertised in regular periodicals of general

158 See, e.g., MATTHEW JOSEPHSON, *THE ROBBER BARONS* 445-53 (1934); RUDOLPH J.R. PERITZ, *COMPETITION POLICY IN AMERICA 1888-1992: HISTORY, RHETORIC, LAW* 11 (1996) ("[F]aith in common-law regulation, this trust in liberty of contract, was shaken by changed economic circumstances.").

159 198 U.S. 45 (1905).

160 See generally RICHARD HOFSTADTER, *THE AGE OF REFORM* (1955).

161 See *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

circulation.¹⁶² The 1904 St. Louis World’s Fair recognized the growth of the industry and staged “Ad-Men’s Day” with a meeting grandly named “The International Advertising Association.”¹⁶³ Professionalization of advertising continued with the creation of Associated Advertising Clubs, later the Advertising Federation of America, which was formed in 1905.¹⁶⁴ Other advertising groups were formed later, including the New York Advertising League in 1906 and the American National Advertising Managers in 1910.¹⁶⁵

1. Reform Movements

Despite these moves within the industry, advertising was not immune from the growing perception that a larger governmental role was needed to check the unrestrained exercise of property rights. The first serious concerns about advertising had been raised by the press itself against the patent medicine industry.¹⁶⁶ Magazines that once had accepted the patent medicine advertisements—such as the *Ladies Home Journal* and *Collier’s*—led the charge in 1904 and 1905 against the fraudulent claims made by the industry.¹⁶⁷ Some papers, including the Scripps-McRae League of Newspapers, appointed censors to scrutinize all advertising copy for questionable claims.¹⁶⁸ The public outcry against adulterated and dangerous foods and drugs ultimately led to the passage of the federal Food and Drug Act of 1906.¹⁶⁹ This legislation forced manufacturers to justify their claims and list product ingredients.

Patent medicines were not the only target of early reformers. By the early 1900s, billboards and other advertising were viewed by some as littering the American landscape.¹⁷⁰ Concerns were also manifested about testimonial advertising by celebrities that did not disclose that a fee had been paid for their endorsement of the product.¹⁷¹ These and other concerns caused the advertising industry in 1911 to push for a model statute barring “untrue, deceptive, or misleading” advertising.¹⁷² At that time, only Massachusetts and New York had statutory provisions barring fraudulent advertising.¹⁷³

¹⁶² See PRESBREY, *supra* note 57, at 362.

¹⁶³ See GEORGE FRENCH, 20TH CENTURY ADVERTISING 119 (1926).

¹⁶⁴ See WOOD, *supra* note 51, at 335.

¹⁶⁵ See FRENCH, *supra* note 163, at 131, 141.

¹⁶⁶ See WOOD, *supra* note 51, at 325.

¹⁶⁷ See *id.* at 327-30, 332.

¹⁶⁸ See *id.* at 334.

¹⁶⁹ See *id.* at 333.

¹⁷⁰ See *id.* at 347.

¹⁷¹ See *id.* at 392-93.

¹⁷² HURNARD J. KENNER, THE FIGHT FOR TRUTH IN ADVERTISING 28 (1936).

¹⁷³ See WOOD, *supra* note 51 at 336.

The advertising industry moved to address these concerns. By 1920, thirty-seven states had adopted the Advertising Federation of America's model antifraud statute.¹⁷⁴ Although politically significant and popular, these state legislative efforts largely represented a codification of long-standing common-law restrictions on false or misleading commercial messages.¹⁷⁵

2. New Heights of Prestige For Advertising During World War I

Even in the wake of these reform movements, advertisers reached new heights in public prestige and prevalence during the first few decades of the twentieth century. Advertisements during World War I helped to sell \$24 billion in war bonds to twenty-two million Americans and raise \$400 million for the Red Cross.¹⁷⁶ As Frank Presbrey remarked, "Advertising did not win the war, but it did its bit so effectively that when the war was over advertising . . . had the recognition of all governments as a prime essential in any large undertaking in which the active support of all the people must be obtained for success."¹⁷⁷

As was the case after the Civil War, this widespread recognition of the power of advertising during wartime was not lost on manufacturers and retailers when peace returned. The *New Republic* effusively observed a year after the armistice that the "advertising man was the acknowledged genius of America" and that there was no longer a need for him to conceal his awareness that he was the cornerstone of the newspapers and the magazines.¹⁷⁸

Advertising's ascendancy continued into the 1920s. As President Coolidge remarked at the 1926 International Advertising Association's Washington convention, "The preeminence of America in industry . . . has come very largely through mass production. Mass production is only possible where there is mass demand. Mass demand has been created almost entirely through the development of advertising."¹⁷⁹

Business shared President Coolidge's assessment of advertising's value. Total investment in advertising soared from \$1.5 billion in 1918 to almost \$3 billion in 1920 and continued to grow throughout the decade.¹⁸⁰ Part of this growth stemmed from the use of radio as a new advertising

174 *See id.*

175 *See* WALSH, *supra* note 111, at 328-29 (tracing the development of the action of deceit from mid-fourteenth century).

176 *See* PRESBREY, *supra* note 57, at 565.

177 *Id.* at 566.

178 WOOD, *supra* note 51, at 367.

179 President Calvin Coolidge, Address at the International Advertising Association's Washington Convention (1926), *quoted in* PRESBREY, *supra* note 57, at 598.

180 *See* WOOD, *supra* note 51, at 364-65.

medium. Although the first radio advertisement did not air until 1923, by 1929 the industry received an estimated \$15 million in advertising revenues for its roughly 500 broadcast stations.¹⁸¹

B. *Backlash from the Great Depression*

The Great Depression hit advertising hard not only in terms of income, but perhaps more importantly in public esteem. Following the stock market crash, advertising revenues tumbled from \$3.4 billion in 1929 to \$1.3 billion in 1933.¹⁸² Just as advertising was perhaps irrationally credited for the boom years, so too was it a target for blame as the Depression took hold. Advertising was attacked as wasteful; its critics charged that it did nothing more than add to the consumers’ cost.¹⁸³ It was not just an attack on advertising, however, because, as James Playsted Wood explained, “[T]he entire economic system of which advertising was seen as a vociferous, raucous and treacherous part, was under attack.”¹⁸⁴ Wood described the national search for the cause of the Depression as follows:

There had to be a villain. Advertising as the public voice of industry and business was obvious and accessible to attack. Advertising had been used to urge people to expenditures they could not afford, to lure with false promises, to lull into false security. Advertising was to blame, and shrill cries arose for its annihilation.¹⁸⁵

Public skepticism about the role of advertising in the American economy also rose significantly. The consumers’ movement formed during this era, producing best-selling exposés of advertising practices with such lurid titles as *100,000,000 Guinea Pigs*; *Eat, Drink and Be Wary*; and *Partners in Plunder*.¹⁸⁶

The national mood during the Depression spurred calls for increased restrictions on advertising. The federal government aggressively responded to the perceived excesses of advertising. For example, Rexford Guy Tugwell, a Columbia University economist who was later appointed an Assistant Secretary of Agriculture by President Roosevelt, had written extensively regarding “the waste and extravagance of advertising which merely attempted to turn sales from one company to that of another

181 See PRESBREY, *supra* note 57, at 578.

182 See WOOD, *supra* note 51, at 417.

183 See *id.* at 424.

184 *Id.* at 418.

185 *Id.*

186 See *id.* at 419-20.

making a product identical in value.”¹⁸⁷ Tugwell saw advertising as one of the culpable inefficiencies of the discredited competitive system.¹⁸⁸ When in office, Tugwell championed sweeping federal legislation to centralize grade labeling, define false advertising, and centralize enforcement in the Secretary of Agriculture.¹⁸⁹

C. *Judicial Protection of Commercial Speech During the Lochner Era*

Although disenchantment among the body politic with economic liberties had led to increased state regulation of the economy, the Supreme Court had acted as a brake on that sentiment, employing the doctrine of substantive due process to strike down many state laws. Mistakenly, advertising came to be regarded as an economic regulation to be analyzed under the Due Process Clause, instead of under the First Amendment, where it belonged. This confusion of categories—although it temporarily resulted in greater protection of advertising than of political speech—caused commercial speech to be unjustifiably segregated to noncommercial speech and discredited when the doctrine of economic substantive due process was properly discarded.

1. The U.S. Supreme Court and Advertising During the *Lochner* Era

Before 1919, the Supreme Court treated political speech as subject to regulation by the states pursuant to their police power. The Court did not at this time treat the First Amendment as applying to, or constraining, the states’ power.¹⁹⁰ By contrast, the Court interpreted the due process clause of the Fourteenth Amendment, which explicitly applied to the states, as limiting the ability of the states to restrict economic freedom.

For this reason, most judicial challenges during this period to restrictions on advertising did not advance First Amendment claims. Rather, they relied on a substantive due process claim that the restrictions interfered with the pursuit of a lawful business. For example, in 1902 the Supreme Court had held that the Postmaster General had unlawfully stopped mail delivery based on his determination that a Christian Scientist

187 *Id.* at 426.

188 Then New York Governor Al Smith described Tugwell as follows: “He regards advertising as largely a waste, and he thinks government should take a hand in limiting the costs to the ultimate consumer by cutting out the advertising middle man. He also believes that government control of industry will take the place of mere regulation . . .” *Id.* at 427.

189 *See id.* at 426.

190 It was not until 1925 that the Supreme Court held that the First Amendment applied to the states. *See Gitlow v. New York*, 268 U.S. 652, 667 (1925).

School was engaged in mail fraud.¹⁹¹ Justice Peckham did not discuss First Amendment freedoms. Nonetheless, as Rudolph Peritz observes, he showed “solicitude towards commercial speech” by finding the government’s enforcement of the law improper by characterizing Magnetic Healing’s activities as “mere matters of opinion upon subjects which are not capable of proof as to their falsity.”¹⁹² In essence, the Court was using the Due Process Clause to protect economic liberty which, in this case, happened to be advertising.

In summarizing the Supreme Court’s attitude towards commercial speech during the *Lochner* era, Peritz explains that “The Court did not treat all speech as a political activity subject to government ordinance. Some speech was protected as a valuable economic activity . . . ‘[F]ree trade in ideas’ became a commercial canon long before it would become the metaphorical key to constitutional protection of political speech.”¹⁹³ This transition to judicial treatment of advertising restrictions as infringements on economic liberty is further illustrated, and perhaps epitomized, by *Halter v. Nebraska*,¹⁹⁴ decided in 1907, in which the Court upheld a state law barring the use of the American flag on beer bottles. In *Halter*, the parties failed even to raise a First Amendment challenge, instead relying on a substantive due process claim.

2. State Courts and Advertising During the *Lochner* Era

State courts during this period also analyzed, and in many cases invalidated, challenges to advertising regulations under the rubric of substantive due process—i.e., they also treated such laws as potentially violative of the Fourteenth Amendment, not the First. For example, in *Ware v. Ammon*,¹⁹⁵ the Kentucky Court of Appeals in 1925 scrutinized an act barring advertising by dry cleaners without first obtaining the fire marshal’s permission to engage in business. The court observed that “No right of a citizen is more valuable than the right to earn his livelihood in any lawful occupation.”¹⁹⁶ The Kentucky court struck down the statute as unconstitutional, finding that a “necessary incident to this former right is the further right to advertise one’s business in any lawful and proper

191 See *American Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902).

192 RUDOLPH J.R. PERITZ, *COMPETITION POLICY IN AMERICA, 1888-1992*, at 102-03 (1996).

193 *Id.* at 100-01.

194 205 U.S. 34 (1907). In other advertising cases, the Court rejected substantive due process challenges to state and local restrictions on advertising. See, e.g., *Packer Corp. v. Utah*, 285 U.S. 105 (1932); *St. Louis Poster Adv. Co. v. City of St. Louis*, 249 U.S. 269 (1919); *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526 (1917); *Fifth Ave. Coach Co. v. City of New York*, 221 U.S. 467 (1911).

195 278 S.W. 593 (Ky. Ct. App. 1925).

196 *Id.* at 595.

way.”¹⁹⁷ This decision illustrates the view of the time, which treated advertising not as a right to communicate, but as an economic activity subject to the same due process protection as other such activities.

Similarly, in *Seattle v. Proctor*,¹⁹⁸ the Washington Supreme Court in 1935 struck down as unreasonable a city statute compelling businesses to disclose “the number of such . . . [articles] and the lowest price at which each of said articles was offered for sale to the public prior to said advertisement.”¹⁹⁹ Arguably, the purpose of the regulation was to limit false advertising by making clear that an advertised “sale” was really a sale and that there were enough “sale” articles on hand to warrant the consumer making a trip to the store. Notwithstanding this justification, the Washington Supreme Court found that “The right to advertise one’s business is a valuable property right.”²⁰⁰ The court held that the legislature could not, “under the guise of regulation [of false and misleading advertising], impose arbitrary restrictions amounting to a denial of that right.”²⁰¹

Many state courts explicitly recognized that advertising implicated both property rights and basic civil liberties secured by federal and state constitutions. For example, in striking down a statute that barred funeral directors from print advertising, the Indiana Supreme Court in 1942 held that an “absolute prohibition, irrespective of considerations of public welfare, of printed advertising of prices of services or commodities which may lawfully be offered for sale, and which may be legally advertised otherwise than visually, has no constitutional justification.”²⁰² The same court, later that year, struck down a law restricting price advertising by optometrists, an obvious restraint on trade. In so doing, the Indiana Court held:

Truthful price advertising is a legitimate incident to a lawful merchandising business. Deprivation of the right so to advertise has been held to violate the due process clause of the Fourteenth Amendment. . . . We cannot assume that the Legislature intended to permit the sale of eyeglasses as merchandise but to deprive the dealer of one of the reasonable means of procuring purchasers for such merchandise.²⁰³

197 *Id.* at 595.

198 48 P.2d 238 (Wash. 1935).

199 *Id.* at 239.

200 *Id.* at 240.

201 *Id.*

202 *Needham v. Proffitt*, 41 N.E.2d 606, 608 (Ind. 1942).

203 *State ex rel. Booth v. Beck Jewelry Enters., Inc.*, 41 N.E.2d 622, 626 (Ind. 1942) (citations omitted).

The states were divided on the impact of substantive due process on distributing commercial handbills or soliciting customers. Many ordinances were struck down on these grounds.²⁰⁴ Other such ordinances survived these challenges.²⁰⁵

D. *The Supreme Court First Differentiates Commercial From Noncommercial Speech*

As the New Deal was born and hostility to unfettered capitalism grew, states increasingly upheld commercial speech restrictions as a valid exercise of the expanding police power over commerce.²⁰⁶ The same was true of the United States Supreme Court. In its first case assessing whether the First Amendment protected advertising, the Supreme Court—with little discussion—held that “purely commercial” speech was not entitled to constitutional protection.

In *Valentine v. Chrestensen*,²⁰⁷ the Court considered the validity of a New York City ordinance that barred the distribution of commercial and business advertising material on the streets. Mr. Chrestensen first had attempted to distribute a handbill soliciting patrons for a tour of an old Navy submarine for a stated fee. After city authorities objected, Chrestensen reprinted his handbill as a double-faced document. One side advertised the exhibit and solicited visitors, without reference to an admission price. The other side contained a protest against the City Dock Department for its refusal to allow Chrestensen to use the city pier to exhibit his submarine. Thus, the commercial and noncommercial elements in the case were physically, if not analytically, inseparable.

In its opinion rejecting Chrestensen’s claim, the Supreme Court did recognize that states and municipalities cannot “unduly burden or proscribe” the “exercise of the freedom of communicating information and disseminating opinion” in public thoroughfares.²⁰⁸ But the Court held that the “Constitution imposes no such restraint on government as respects purely commercial advertising.”²⁰⁹ The majority concluded that the addition of the handbill’s second side was simply a ruse to evade the

204 See, e.g., *Prior v. White*, 180 So. 347 (Fla. 1938); *In re Thornburg*, 9 N.E.2d 516 (Ohio Ct. App. 1936); *City of Orangeburg v. Farmer*, 186 S.E. 783 (S.C. 1936).

205 See e.g., *People v. St. John*, 288 P. 53 (Cal. App. Dep’t. Super. Ct. 1930); *City of Philadelphia v. Brabender*, 51 A. 374 (Pa. 1902).

206 See, e.g., *People v. Pennock*, 293 N.W. 759 (Mich. 1940) (upholding statute that made it unlawful to display or advertise contraceptive devices); *Allen v. McGovern*, 169 A. 345 (N.J. 1933) (upholding ordinance forbidding unsolicited advertising); *Semler v. Oregon State Bd. of Dental Exam’rs*, 34 P.2d 311 (Or. 1934) (upholding ordinance barring dentists from certain types of advertising), *aff’d*, 294 U.S. 608 (1935).

207 316 U.S. 52 (1942).

208 *Id.* at 54.

209 *Id.*

ordinance's effect and so could be disregarded with little comment.

By the time the Supreme Court decided *Valentine*, the notion of substantive due process had been rejected, and review of economic legislation had been reduced to "rational basis" scrutiny—a mode of analysis extremely deferential to legislative judgments.²¹⁰ *Valentine*'s dismissive treatment of commercial speech seems most closely linked to the Court's line of cases rejecting economic substantive due process, rather than any evaluation of the First Amendment guarantees envisioned by the Founders. *Lochner* had been repudiated, and the notion of economic liberty almost completely rejected;²¹¹ to the extent commercial speech had been viewed as some form of property interest, such speech appears to have been categorized as an unprotected interest.²¹² Thus, what Professors Doug Kmiec and John McGinnis have said about the Contracts Clause applies as well to the protection of commercial speech: "Misinterpreted as a form of substantive economic due process, [protection of commercial speech] was wrongly discredited when that doctrine [of substantive due process] was rightly discarded."²¹³

The Supreme Court's distinction between commercial and noncommercial speech was called into question almost immediately. The three-page *Valentine* opinion had sidestepped the question of whether speech driven by "mixed" profit and political motivations should be treated differently—not to mention why, exactly, speech motivated by commercial interests deserved no constitutional consideration at all. As later cases raised these issues, Justice Douglas, who had joined the *Valentine* majority, stated in 1959, "The ruling was casual, almost offhand. And it has not survived reflection."²¹⁴

A few years later, the landmark case of *New York Times v. Sullivan*²¹⁵ involved a libel claim based on a political statement made in a paid advertisement. The Court accorded full First Amendment protection to the statement, despite its appearance in an advertisement. *Sullivan* highlighted the problematic nature of the Supreme Court's sweeping treatment of advertisements in *Valentine*, and cried out for a more nuanced analysis and for reevaluation. By 1974, four justices agreed that there was "some doubt

210 See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) ("[R]egulatory legislation affecting ordinary commercial transactions" was not "to be pronounced unconstitutional unless . . . it [does not rest] upon some rational basis"); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

211 See, e.g., *Carolene Prods.*, 304 U.S. at 152.

212 See David Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699, 1729-30 (1991) (describing the *West Coast Hotel* line of cases as legitimizing the activist state and repudiating the prior era's *Lochner*-style constitutionalization of rights to property and contract).

213 Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 HASTINGS CONST. L.Q. 525, 526 (1987).

214 *Cammarano v. United States*, 358 U.S. 498, 514 (1959) (Douglas, J., concurring).

215 376 U.S. 254 (1964).

concerning whether the ‘commercial speech’ distinction announced in *Valentine v. Chrestensen* . . . retains continuing validity.”²¹⁶ These cases set the stage for the Supreme Court’s explicit recognition that advertising was entitled to constitutional protection.

IV. The Court’s Current Approach: The Prospect of Protection and the Pitfalls of Balancing

The preceding Part illustrated how the Court’s mistreatment of commercial speech as an economic due process right during the *Lochner* era led the Court to stray from original First Amendment principles by refusing in *Valentine* to afford constitutional protection to commercial speech. This Part begins by showing how advertising addressing political hot-button issues, such as civil rights and abortion, forced the Court to reconsider its view that advertising was not entitled to any First Amendment protection. This reevaluation culminated in the landmark commercial speech decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,²¹⁷ in which the Court ruled that the First Amendment forbids an outright ban on all commercial communications by an industry on the basis that they are somehow inherently misleading.

In affording some constitutional protection for commercial speech, however, the Court fell far short of providing advertising the constitutional protection it deserves under the First Amendment.²¹⁸ Instead, in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,²¹⁹ it adopted a balancing test requiring courts to weigh the competing interests of commercial speakers and government regulators. This Part argues that the subjective *Central Hudson* test, in addition to deviating from the original understanding of the First Amendment set forth above, has produced an inconsistent Supreme Court commercial speech jurisprudence and sowed confusion in the lower courts; furthermore, its indeterminacy has encouraged politicians to propose (occasionally dramatic) restrictions on advertising of unpopular products. Although the Court’s recent decision in *44 Liquormart, Inc. v. Rhode Island*²²⁰ suggests the possibility that the Court is moving toward a more protective stance in commercial speech cases, the Court persists in its treatment of commercial speech as “low value” speech. Accordingly, an abandonment of the

216 *Lehman v. City of Shaker Heights*, 418 U.S. 298, 314 n.6 (1974) (citation omitted) (Brennan, J., dissenting).

217 425 U.S. 748 (1976).

218 *See supra* Part III.

219 447 U.S. 557 (1980).

220 417 U.S. 484 (1996).

Central Hudson test—and the distinction between commercial and noncommercial speech—is necessary both to return modern Supreme Court jurisprudence to the original understanding of the First Amendment and to eliminate the indeterminacy and confusion that has resulted from the *Central Hudson* test.

A. *Protection and Balancing: Virginia Pharmacy to Central Hudson*

1. Rejection of *Valentine*

The resurrection of commercial speech rights began in 1975 with *Bigelow v. Virginia*,²²¹ a politically charged case concerning the legality of advertisements for abortion services. In striking down a Virginia statute that would have prohibited advertisements generated in New York, the Court engaged in a rough sort of balancing test to weigh the state's interest against the First Amendment protections attached to the advertisement. The majority acknowledged that the state's asserted justification for the abortion advertisement—maintaining the quality of medical care within its borders—was a legitimate interest. Yet the Court concluded that the state's interest did not outweigh the citizens' First Amendment right to receive information about services lawfully offered outside its borders.

Although *Bigelow* involved other constitutional considerations not usually present in commercial speech cases,²²² the Court used the opinion to limit explicitly the holding of *Valentine*. The Court held that *Valentine* was not "authority for the proposition that all statutes regulating commercial advertising are immune from constitutional challenge. The case obviously does not support any sweeping proposition that advertising is unprotected *per se*."²²³ The Court declined, however, to decide "the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit."²²⁴

221 421 U.S. 809 (1975).

222 The service advertised in *Bigelow* was directly connected to a constitutional right to obtain an abortion, which the Court announced in *Roe v. Wade*, 410 U.S. 113 (1973), decided while *Bigelow* was pending. Of course, most advertisements do not involve goods or services supporting the exercise of a constitutional right.

223 *Bigelow*, 421 U.S. at 820. Although *Bigelow* represented a major step forward for commercial speech, the political overtones of the case limited the decision's applicability. The majority found that the advertisement in *Bigelow* "did more than simply propose a commercial transaction. It contained factual material of clear 'public interest.'" *Id.* at 822. The Court said that the advertisement's references to the legality of abortions for nonresidents in New York conveyed useful facts to any reader "with a general curiosity about, or genuine interest in, the subject matter or the law of another State and its development, and to readers seeking reform in Virginia." *Id.*

224 *Id.* at 825. Writing for the majority, Justice Blackmun—who had also authored *Roe v. Wade*—stated that "[a]dvertising, like all public expression, may be subject to reasonable regulation

Later in the same term, however, the Court directly confronted a more typical commercial speech dispute. The statute challenged in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,²²⁵ prohibited licensed pharmacists from advertising the prices for which they sold prescription drugs. The state claimed the ban was a necessary part of its licensing scheme to guarantee that pharmacists conducted themselves as professionals. Those challenging the ban claimed it only protected pharmacists from competition.²²⁶

Virginia Pharmacy squarely held that pure commercial speech—that is, speech that does “no more than propose a commercial transaction”—is entitled to First Amendment protection.²²⁷ The Court disfavored the protection of citizens through government-enforced ignorance; rather, it said, “people will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication rather than to close them.”²²⁸ The Court recognized that “the free flow of commercial information is indispensable . . . to the proper allocation of resources in a free enterprise system” and to “the formation of intelligent opinion as to how that system ought to be regulated.”²²⁹ The opinion appeared, at least initially, to be more favorable to commercial speech than the balancing approach suggested in *Bigelow*.²³⁰ Writing for the majority, Justice Blackmun eschewed the idea of weighing the state’s interest in regulating pharmacists against the First Amendment benefits inherent in the free flow of information.²³¹

Although *Virginia Pharmacy* clearly rejected the proposition that commercial speech was unprotected under the First Amendment, the case did not embrace the proposition that commercial speech was absolutely protected from regulation. A footnote late in the opinion stated that commercial speech may be differentiated from “other varieties” of protected speech, as “a different degree of [constitutional] protection is necessary to insure that the flow of truthful and legitimate commercial

that serves a legitimate public interest.” *Id.* at 826. Government, however, could not insulate any advertising restriction from a First Amendment challenge simply by labeling the communication at issue “commercial speech.” *Id.*

225 425 U.S. 748 (1976).

226 *See id.* at 753-54.

227 *Id.* at 762 (quoting *Pittsburgh Press Co. v. Human Relations Comm’n*, 413 U.S. 376, 385 (1973)).

228 *Id.* at 770.

229 *Id.* at 765.

230 Although the majority in *Virginia Pharmacy* agreed that there was “a clear relationship between the advertising in question and an activity that the government was legitimately regulating,” it gave that connection, in essence, short shrift. *Virginia Pharmacy*, 425 U.S. at 766-70.

231 “[T]he choice among these alternative approaches is not ours to make or the Virginia General Assembly’s. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.” *Virginia Pharmacy*, 425 U.S. at 770.

information is unimpaired.”²³² The Court posited that the government could have greater scope to ensure that commercial messages were not false or misleading, because—although the First Amendment requires high tolerance of inaccuracies in noncommercial speech because of the risk of chilling certain perspectives—the more robust nature of advertising, driven as it is by simple commercial motives, makes it unlikely that such restrictions would silence accurate, nondeceptive commercial communication.²³³ The Court called this a “commonsense” distinction.²³⁴ It later proved, however, to be an unfortunate hook used to diminish First Amendment protection of commercial speech.²³⁵

2. *Central Hudson* and the Balancing Test

In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,²³⁶ the Court elaborated upon—and in the process significantly diminished—the extent of the constitutional protection it appeared to furnish commercial speech in *Virginia Pharmacy*. Based in part on the aforementioned footnote in the majority opinion in *Virginia Pharmacy*,²³⁷ the Court adopted a balancing test, which gives the government the opportunity to justify restrictions on commercial speech—even if that speech is truthful and not deceptive.²³⁸ The indeterminacy of this test runs the risk of allowing the government to adopt advertising regulations based on the view, as one Justice cynically put it, “that consumers should be misled or uninformed for their own protection.”²³⁹

In *Central Hudson*, the Court struck down a New York Public Service Commission (PSC) regulation that prohibited all advertisements promoting the use of electricity. Although it acknowledged that blanket bans on commercial speech that were truthful and related to lawful activities have been consistently invalidated,²⁴⁰ the Court concluded that all commercial speech challenges should be reviewed through a four-part balancing analysis. Under this balancing test, a court must determine whether:

232 *Id.* at 771-2 n.24.

233 *See id.*

234 *Id.* at 771 n.24.

235 Justice Blackmun himself has since argued that the passage has been misread. *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 573-79 (1980) (Blackmun, J., concurring in judgment); *see also City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 436 (1993) (Blackmun, J., concurring).

236 447 U.S. 557 (1980).

237 425 U.S. at 771-72 n.24.

238 *See Central Hudson*, 447 U.S. at 561-66.

239 *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 497 (1995) (Stevens, J., concurring).

240 *See Central Hudson*, 447 U.S. at 566 n.9.

- 1) the commercial speech concerns a lawful activity and is not misleading;
- 2) the government interest asserted to justify the regulation is substantial;
- 3) the regulation directly advances that government interest; and
- 4) the regulation is no more extensive than necessary to serve that interest.²⁴¹

Applying this four-step analysis to the facts in the *Central Hudson* case, the Court held that the PSC regulation violated the First Amendment.²⁴²

Although *Central Hudson* rejected the *Valentine*-era’s “highly paternalistic” notion that government could completely suppress commercial speech,²⁴³ the decision elevated *Virginia Pharmacy*’s hint of second-class status for commercial speech to the level of black-letter law. Building on the supposedly “commonsense” distinction between commercial and noncommercial speech, the Court held that the First Amendment accords a lesser level of protection to commercial speech.²⁴⁴ Thus, today, the Court regularly reiterates that “the Constitution . . . accords a lesser protection to commercial speech than to other

241 See *id.* at 564-66. In a later case, the fourth prong of the test was redefined as requiring only that the fit between the state’s goal and the challenged regulation be reasonable. See *Board of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989).

242 There was no claim that the advertisements were inaccurate or related to unlawful activities. See *Central Hudson*, 447 U.S. at 566. The commission asserted two interests—a state interest in conserving energy and a concern that rates be fair and efficient—that the Court determined were substantial state interests. See *id.* at 567. However, the regulation failed the third step of the test because the majority found that the state simply could not demonstrate that the “link between the advertising prohibition” and the state’s goal of maintaining “fair and efficient rates” was anything more than “tenuous.” *Id.* at 569. And, although the Court accepted the argument that the advertising ban could directly advance the state’s goal of energy conservation, the regulation also failed the fourth step of the test because it was more extensive than necessary to serve this interest. See *id.* at 570-71. The PSC ban on advertising swept so broadly—or, in legal terms, proved so overinclusive—that it prohibited even advertisements that would promote more efficient services and reduce energy use.

243 See *Central Hudson*, 447 U.S. at 562.

244 Despite the holding invalidating the regulation at issue in *Central Hudson*, the justices most supportive of First Amendment protection for commercial speech were displeased with the analysis used to reach that result. In concurring with the outcome of the case only, Justice Blackmun, joined by Justice Brennan, asserted that the *Central Hudson* test was “not consistent with our prior cases and does not provide adequate protection for truthful, nonmisleading, noncoercive commercial speech.” *Central Hudson*, 447 U.S. at 573 (Blackmun & Brennan, J.J., concurring). Justice Blackmun also argued that the newly announced “intermediate” standard of First Amendment review for commercial speech should not be applied “when a State seeks to suppress information about a product in order to manipulate a private economic decision that the State cannot or has not regulated or outlawed directly.” *Id.* at 573. Influencing “public conduct through manipulation of the availability of information” was an illegitimate government goal. *Id.* at 578. Justice Blackmun’s position, if not his logic, brings him to the same conclusion reached through historical analysis of the First Amendment.

constitutionally guaranteed expression."²⁴⁵

B. *Defects In the Court's Current Approach*

For nearly twenty years, the *Central Hudson* test has been used to assess restrictions on advertising. More often than not, the Court has found challenged restrictions on commercial speech to be unconstitutional. On those occasions, the intermediate scrutiny imposed by the *Central Hudson* analysis turned out to be searching indeed.²⁴⁶ For example, in *City of Cincinnati v. Discovery Network, Inc.*,²⁴⁷ *Edenfield v. Fane*,²⁴⁸ and *Rubin v. Coors Brewing Co.*,²⁴⁹ the Court emphasized the heavy burden that the

²⁴⁵ *Id.* at 563.

²⁴⁶ Commercial speech has benefited from its association, in a number of key cases, with favored liberal causes such as reproductive freedom and civil rights. For example, in *Carey v. Population Services International*, 431 U.S. 678 (1977), the Court, in striking down a law restricting (among other things) advertising or displaying of contraceptives, refused to countenance the suppression of information about the price and availability of contraceptives. The Court rejected the contentions that such advertisements would offend and embarrass those exposed to them, or legitimize sexual activity among young people, finding that these justifications do not validate the suppression of expression protected by the First Amendment. Following the logic of *Carey*, in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), the Court held unconstitutional a statute prohibiting the mailing of unsolicited advertisements for contraceptives, recognizing that when the asserted governmental interest is not to protect the recipient from deception, but from the perceived ill effects of receipt of truthful information, the messages are protected. *See id.* at 74.

In *Linmark Associates v. Willingboro Township*, 431 U.S. 85 (1977), the Court unanimously overturned a municipal ordinance that forbade the posting of real estate "For Sale" signs and was adopted to stem the perceived flight of white homeowners from a racially integrated community. *See id.* at 96. As in *Virginia Pharmacy*, the Court held that "we were unpersuaded that the law was necessary to achieve this objective, and . . . that, in any event, the First Amendment disabled the State from achieving its goal by restricting the free flow of truthful information." *Id.* at 95.

The Court has also been particularly active in protecting the right of attorneys to advertise. *See, e.g.,* *Peel v. Attorney Registration and Disciplinary Comm'n*, 496 U.S. 91 (1990) (invalidating a rule prohibiting the truthful statement in an advertisement that an attorney is certified as a "specialist" by the National Board of Trial Advocacy); *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988) (holding that the First Amendment protects truthful, nonmisleading letters sent to individuals known to face particular legal problems); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (holding that truthful attorney advertising is constitutionally protected).

²⁴⁷ 507 U.S. 410 (1993). In *Discovery Network*, the Court struck down a city ban that prohibited newsracks on public property if the racks were used to distribute "commercial handbills." The city had only allowed the use of newsracks containing "newspapers." *Id.* at 418. Although it assumed that Cincinnati's asserted interests in safety and esthetics were legitimate, the Court held that because both "commercial handbills" and "newspapers" were responsible for the safety problems and esthetic concerns motivating the ban, the city had failed to establish a "reasonable fit" between its goals and the restriction. *See id.* at 426-27.

²⁴⁸ 507 U.S. 761 (1993). In *Edenfield*, the Court struck down a restriction, imposed and enforced by the Florida Board of Accountancy, that prohibited CPAs from making uninvited in-person visits or telephone calls to a potential client. *See id.* at 764-65. Although the Court did not seriously question the board's asserted interest in protecting consumers from fraud, it ruled that the cold-call ban failed under the third prong of the *Central Hudson* test because the board had not adequately demonstrated that personal solicitation caused the harms the board allegedly aimed to avoid. *See id.* at 771.

²⁴⁹ 514 U.S. 476 (1995). In *Coors Brewing*, the Court invalidated a federal law that barred brewers from displaying the alcohol content of their beers on the labels of their products. The Court, while acknowledging the government's substantial interest in protecting the health, safety, and welfare

government bears in defending restrictions on commercial speech, and the mass of evidence that the government must adduce to sustain that burden.²⁵⁰

The Court has been inconsistent in its application of *Central Hudson*, however. As might be expected given the subjective nature of the test, the Court has sometimes used a relatively weak version of intermediate scrutiny. In particular, the Court has upheld restrictions on advertising that either (1) ostensibly prevented consumers from being misled or (2) concerned products, services, or activities that were not unambiguously lawful.²⁵¹ Moreover, in cases such as *United States v. Edge Broadcasting Co.*,²⁵² and *Florida Bar v. Went For It*,²⁵³ the Court has suggested that deference is due to (often self-serving) legislative determinations that the

of its citizens by preventing brewers from competing on the basis of alcohol strength, found that the labeling restriction did not "directly" advance the government's interest. See *id.* at 491. Furthermore, the Court roundly rejected the government's position that legislatures have broader latitude to regulate speech that promotes "socially harmful activities" such as gambling, or alcohol or tobacco consumption. See *id.* at 482-83.

250 Reaffirming the importance of free communication of truthful, nonmisleading commercial information, the Court stated in *Edenfield*:

The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented.

507 U.S. at 767.

251 See, e.g., *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985) (approving a requirement that attorneys inform the public that they may be responsible for costs (but not legal fees) if they hire a lawyer on a contingent fee basis "as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers"); *Friedman v. Rogers*, 440 U.S. 1, 13 (1979) (upholding a statute banning the use of trade names by optometric offices on the ground that "there is a significant possibility that trade names will be used to mislead the public"); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (upholding a ban on in-person solicitation by lawyers because (1) it prevented attorneys from taking commercial advantage of prospective clients who may be misled or deceived in the proposed transaction and (2) the facts of the case were particularly egregious).

252 509 U.S. 418 (1993). In *Edge*, the Court employed sweeping language to uphold federal legislation which banned broadcasts of lottery advertising by radio stations in nonlottery states, but which allowed such advertisements to be broadcast by stations located in states that had state-supported lotteries. The Court held that the legislation directly advanced the federal government's interest in "balancing the interests of lottery and non-lottery States" even if the advancement of that interest was "only marginal." *Id.* at 428-29. In *Edge* the proscribed messages concerned gambling, a long-disfavored activity. Such proscription is not entirely inconsistent with the original understanding of the First Amendment, which did not protect advertising of illegal activities. However, *Edge* seemed to indicate that the Supreme Court would be willing to defer to the legislature as to whether the regulation would "directly advance" a state's asserted interest, and that any restriction on advertising would automatically advance the goal of diminishing consumption of the advertised product.

253 515 U.S. 618 (1995). In *Went For It*, the Court upheld a bar association rule prohibiting lawyers from sending direct mail solicitations to personal injury victims until thirty days after the injury. After finding substantial the Bar's interests in protecting privacy of victims and curbing activities negatively affecting judicial process, the Court deemed the restrictions permissible because they affected only mailings targeting victims when they were most vulnerable (within 30 days of an accident) and addressed the immediate harm to the Bar's reputation that any such mailings created. See *id.* at 625, 634.

restriction will advance the asserted governmental interest. To reach these inconsistent results, the Court has had to constantly rework the balancing test, creating a malleable standard capable of being manipulated by lower court judges.²⁵⁴ This phenomenon has caused some justices increasingly to become dissatisfied with the test—some because of its extra-constitutional nature, and some because of their unhappiness with its application in particular controversies.

1. Specific Flaws in the *Central Hudson* Test

In most applications of *Central Hudson*, the first and second prongs of the test are not at issue. The first prong, concerning whether the speech involves a lawful activity and is not misleading, is generally uncontroversial. As discussed in Part I, there is a solid basis for concluding that, as a historical matter, demonstrably false speech is outside the freedom of speech understood by the Framers to be protected by the First Amendment; the same may be said of solicitations to engage in unlawful activities. Accordingly, state and federal statutes regulating unlawful or misleading communications are rarely challenged and, when they are, the statutes are invariably upheld.

One troubling question that does arise under the first prong of the *Central Hudson* test, however, is the breadth of the government's power to restrict speech on the grounds that it is "misleading." This is particularly an issue when the government is ostensibly seeking to protect an audience that it considers especially susceptible to being misled. Increasingly, government agencies are seeking to justify restrictions of speech based on the need to protect children from being misled, an issue that is considered at greater length below.²⁵⁵ Also, government bodies have successfully sought to shield accident victims from the importuning of lawyers.²⁵⁶

To a certain extent, the problem of assessing when the government is genuinely seeking to guard against fraud will always exist. This is so even if the Court were to hold, in accordance with the original understanding of the First Amendment, that commercial speech is entitled to heightened judicial scrutiny. In that case, courts still would need to assess if the regulations were truly aimed at guarding against fraudulent or misleading communications or, alternatively, if the government was using fraud as a justification to censor speech of which it disapproves for other reasons.

254 Even a defender of the intermediate scrutiny approach acknowledges that "[n]ot only are the terms of the intermediate scrutiny test themselves indeterminate, but the test itself has also been particularly vulnerable to manipulation by the Supreme Court." Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 301 (1998).

255 See *infra* notes 267-69 and accompanying text.

256 See, e.g., *Florida Bar v. Went For It*, 515 U.S. 618 (1995); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978).

Thus, for example, a restriction prohibiting advertisements for a product that children may not lawfully consume may be justifiable if it is limited to advertisements that are directed at, and primarily received by, children. Such a prohibition can be characterized as either guarding against solicitation or ensuring that children are not misled into buying a product that is unlawful for them to buy. Yet a prohibition on all outdoor advertising of alcohol or tobacco, defended on the grounds that children are in the audience, could not credibly be defended as necessary to guard children against an illegal solicitation or being misled. Such a restriction would, in traditional First Amendment parlance, be overbroad, meaning that it would not be narrowly targeted to solving the problem it is ostensibly meant to avoid.

If most of the audience receiving a truthful advertisement about a lawful product would not be misled by such an advertisement, or may lawfully purchase the advertised product, the government should not be permitted to restrict that advertisement to protect the few who may be misled or who may not lawfully purchase or consume such a product. Any other rule would enable the government to evade the constraints of the First Amendment by citing a few vulnerable members of the population. Perhaps the legislature should be afforded some latitude in defining fraud, which has traditionally required judicial determinations of whether a reasonable person would have been misled. But balanced against any such deference must be a recognition—largely absent in the Court’s jurisprudence, but clearly present in the minds of many in the Framing generation²⁵⁷—that commercial speech is vital to the market and to the functioning of democracy, and therefore should not be accorded “low value,” second-class status.

As for the second prong of the *Central Hudson* test, which concerns the substantiality of the government interest in regulating commercial speech, courts generally take a deferential view toward lawmakers’ power to define a governmental interest. Few, if any, cases have turned on whether the second prong of *Central Hudson* is satisfied. Instead, courts generally acknowledge the substantiality of the government’s interest and then turn to an assessment of the third and fourth prongs of the *Central Hudson* balancing test.

It is perhaps not surprising that these third and fourth prongs have proved to be the major battleground on which commercial speech arguments continue to be waged. Whether a restriction works to “directly advance” a state interest, thereby fulfilling the third prong of the test, depends on both the particular facts of a case and, to some extent, a court’s subjective judgment. Likewise, determining whether the means to an end

257 See *supra* Part I.

(a challenged restriction) and the end itself (the state's asserted goal) fit together closely enough to satisfy the fourth prong can be an elusive matter. If it is a legitimate government interest to limit the consumption of a product or service that has the capacity to harm people—which can include ice cream, junk food, milk, meat, snowmobiling, or almost anything else—then any restriction on advertising of such a product can arguably be said to “directly advance” that interest.²⁵⁸ Once that hurdle is reached, the question under the current analysis then becomes whether there exist “numerous and obvious”²⁵⁹ less restrictive alternatives to the government's chosen limitation. This inquiry is heavily spiced with reasonableness considerations,²⁶⁰ leading to great subjectivity in analysis and the risk of inconsistent results, as will be seen in ensuing sections.

2. An Example of *Central Hudson*'s Harmful Potential: *Posadas*

Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico,²⁶¹ decided in 1986, is perhaps the quintessential example of *Central Hudson* gone awry. In *Posadas* the Court upheld Puerto Rico's restriction on casino gambling advertising aimed at residents of Puerto Rico, which was adopted to circumscribe the perceived ill effects of casino gambling on the island's citizens.²⁶² Thus, the word “casino” could not be used in “matchbooks, lighters, envelopes, inter-office and/or external correspondence, invoices, napkins, brochures, menus, elevators, glasses, plates, lobbies, banners, flyers, paper holders, pencils, telephone books, directories, bulletin boards or in any hotel dependency or object which may be accessible to the public in Puerto Rico.”²⁶³ Advertising to tourists was allowed, however; specifically, “advertising distributed or placed in landed airplanes or cruise ships in jurisdictional waters and in restricted areas to travelers only in the international airport and the docks where tourist cruise ships arrive” was permitted.²⁶⁴

The Court upheld the restriction. First, it accepted without analysis the Puerto Rico legislature's asserted interest in safeguarding island

258 See *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 352 (1986) (Brennan, J., dissenting). This assertion is highly disputable in many instances because most advertising in mature markets does not increase consumption, but rather influences a consumer's choice of brands. See JOHN E. CALFEE, *FEAR OF PERSUASION* 83 (1997). Yet courts have been unwilling to accept these arguments, especially where the legislature has found otherwise.

259 E.g., *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1996) (observing that commercial speech restrictions are impermissible if alternatives are “numerous” and “obvious”).

260 See, e.g., *Board of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (stating that the fit between the ends and the means must be reasonable).

261 478 U.S. 328 (1986).

262 See *id.*

263 *Id.* at 333.

264 *Id.*

residents from the “disruption of moral and cultural patterns, the increase in local crime, the fostering of prostitution, the development of corruption, and the infiltration of organized crime” that casino gambling would cause.²⁶⁵ It then found reasonable Puerto Rico’s belief “that advertising of casino gambling aimed at residents of Puerto Rico would serve to increase the demand for the product advertised.”²⁶⁶ The Court also deferred to the legislature’s determination that its restrictions on casino advertising were “no more extensive than necessary to serve the government’s interest.”²⁶⁷

As the Supreme Court has since recognized, *Posadas* makes little sense.²⁶⁸ This approach of giving the government deference in its judgments about whether a restriction “directly advances” the asserted interests in a “narrowly tailored” way turns the First Amendment on its head. Judicial deference to legislative actions is generally a sound policy. But where constitutional rights such as free speech are clearly at issue, courts have an obligation, in the form of a textual warrant, to intervene. The purpose of the First Amendment—indeed, of the entire Bill of Rights—is to empower the judiciary to second-guess legislators. So long as there is a clear warrant in the Constitution to do so, as there is here, the function of the Bill of Rights is to place limits on the majority’s power to act. It is therefore contradictory to integrate a rule of deference to the legislature into an inquiry that is, by definition, meant to second-guess, and constrain, the majority. Furthermore, general First Amendment principles prohibit the government from targeting behavior by limiting speech.²⁶⁹ If a product presents such a danger that it is worthy of governmental intervention, the government should seek to limit the use of that product directly, not indirectly by restricting its advertising.

The *Posadas* Court is also vulnerable for its advancement of the widely criticized argument²⁷⁰ that the “greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling.”²⁷¹ This is quite a dangerous notion. The idea that government can seek to affect consumption by prohibiting advertising would eliminate all constitutional protection for advertising. Modern-day state legislatures arguably have the power to outlaw almost any product or service (other than those that are constitutionally protected themselves, of course, such as books or newspapers). If the power to forbid the

265 *Id.* at 341 (citation omitted).

266 *Id.* at 342.

267 *Id.* at 343 (“We think it is up to the legislature to decide whether or not . . . a ‘counterspeech’ policy would be as effective in reducing the demand for casino gambling as a restriction on advertising.”). *Id.* at 344.

268 See *infra* note 273.

269 See, e.g., *Central Hudson*, 447 U.S. at 578-79 (Blackmun & Brennan, JJ., concurring).

270 See, e.g., Kozinski & Banner, *supra* note 157, at 769-71.

271 *Posadas*, 478 U.S. at 345-46.

consumption of the disfavored product or service necessarily implied the ability to limit speech about that product or service, advertising for any product or service—from ice cream to banking—could presumably be eradicated by the government.²⁷² The *Posadas* approach, if pushed to its logical conclusion, would therefore fly in the face of twenty years of Supreme Court case law affording constitutional protection to advertising.²⁷³

3. Confusion In the Lower Courts

In light of the inconsistency of the Supreme Court's own applications of *Central Hudson*, epitomized by its *Posadas* opinion, it is unsurprising that the indeterminate four-part test has caused confusion and inconsistent decisions in the lower courts as well. Some courts (properly) require the government to prove that an advertising ban will in fact diminish consumption, and further place on the government a burden to show that there are not numerous and obvious less restrictive alternatives to the government's chosen course. Applying this strong interpretation of the *Central Hudson* test, for example, a number of circuits have struck down restrictions on outdoor advertising.²⁷⁴

Other courts, however, follow cases like *Edge Broadcasting*, giving deference to the legislature's determination that restrictions on advertising will in fact diminish consumption. Several recent Fourth Circuit cases exemplify this more deferential approach to the *Central Hudson* test. For example, in *Penn Advertising of Baltimore, Inc. v. Mayor*²⁷⁵ and in *Anheuser-Busch v. Mayor*²⁷⁶ a Baltimore ordinance regulating advertising

272 Cf. *Friends of Earth v. FCC*, 449 F.2d 1164, 1169 (D.C. Cir. 1971) ("The distinction [between cigarettes and gas-guzzling cars] is not apparent to us, any more than we suppose it is to the asthmatic in New York City for whom increasing air pollution is a mortal danger.").

273 See *supra* notes 221-235 and accompanying text. In its more recent decisions on commercial speech, such as *Coors Brewing* and *44 Liquormart*, the Court has explicitly rejected the analysis in *Posadas*. Specifically, in *Coors Brewing*, the Court flatly rejected the Government's assertion that "legislatures have broader latitude to regulate speech that promotes socially harmful activities, such as alcohol consumption, than they have to regulate other types of speech." *Coors Brewing*, 514 U.S. at 482 n.2; see also *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 762-63 (1988) ("[T]hat [greater-includes-the-lessor] syllogism is blind to the radically different constitutional harms inherent in the 'greater' and 'lessor' restrictions. . . . [A] law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship.") (footnote omitted). Although the Court's recent decisions might show *Posadas* to have been an anomaly, the *Central Hudson* test that led to such an erroneous decision is still employed.

274 See, e.g., *National Adver. Co. v. Town of Babylon*, 900 F.2d 551 (2d Cir. 1990) (certain ordinances prohibiting maintenance of off-premises signs unconstitutional); *Ackerly Communications v. City of Somerville*, 878 F.2d 513 (1st Cir. 1989) (ordinance prohibiting maintenance of off-premises sign boards unconstitutional).

275 63 F.3d 1318 (4th Cir. 1995), *vacated and remanded sub nom.* *Penn Adver. v. Schmoke*, 518 U.S. 1030 (1996), *reaff'd*, 101 F.3d 332 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1569 (1997).

276 63 F.3d 1305 (4th Cir. 1995), *vacated and remanded sub nom.* *Anheuser-Busch v.*

of tobacco and alcohol products was upheld.²⁷⁷

In both the *Penn Advertising* and *Anheuser-Busch* cases, the Fourth Circuit upheld the city's ban even though it restricted the dissemination of truthful, nonmisleading commercial speech.²⁷⁸ In *Anheuser-Busch* the Fourth Circuit stated that Baltimore's interest in "protect[ing] children who are not yet independently able to assess the value of the message presented" was sufficiently related to a ban on billboard advertising of tobacco products (except those located in business and industrial areas) to meet the requirements of *Central Hudson*.²⁷⁹

Confusion is an inevitable consequence of asking individual judges to assess the substantiality of an asserted state interest and weigh it against the degree of impingement on otherwise protected speech. Balancing tests, by their very nature, tend to promote unprincipled decisionmaking, confusion, and judicial inconsistency. As Justice Scalia has noted, although "[w]e will have . . . balancing modes of analysis with us forever[,] . . . those modes of analysis should be avoided where possible."²⁸⁰ Balancing tests such as the *Central Hudson* analysis too easily permit judges to "mistake their own predilections for the law," in Justice Scalia's terms.²⁸¹ Especially when dealing with First Amendment freedoms, as Justice Kennedy has said, "the use of . . . traditional legal categories is preferable to the sort of ad hoc balancing that the Court" often performs in First Amendment cases.²⁸² The problems inherent in the *Central Hudson* balancing test could be largely avoided if truthful commercial messages concerning lawful products or services were

Schmoke 517 U.S. 1206 (1996), *reaff'd* 101 F.3d 325 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1569 (1997).

277 These cases were remanded to the Fourth Circuit by the Supreme Court for rehearing after the Court's decision in *44 Liquormart*. See *Penn Adver. v. Schmoke*, 518 U.S. 1030 (1996); *Anheuser-Busch v. Schmoke*, 517 U.S. 1206 (1996). However, the Fourth Circuit reinstated its earlier decisions to uphold the bans, giving *44 Liquormart* a very narrow reading. See *Penn Adver. v. Schmoke*, 101 F.3d 332, 333 (4th Cir. 1996); *Anheuser-Busch v. Schmoke*, 101 F.3d 325, 327-28 (4th Cir. 1996).

278 See 101 F.3d at 333; 101 F.3d at 327-28.

279 *Anheuser-Busch v. Schmoke*, 101 F.3d 325, 329 (4th Cir. 1996). Even though the holdings in these Fourth Circuit cases are inconsistent with the Supreme Court's decision in *44 Liquormart*, the Court has denied *certiorari* in both cases. See *Penn Adver. v. Schmoke*, 520 U.S. 1204 (1997) (denial of *certiorari*); *Anheuser-Busch v. Schmoke*, 520 U.S. 1204 (1997) (denial of *certiorari*). Thus, any confusion as to what the *Central Hudson* test really means is heightened by the Court's own reluctance to clarify its analysis.

280 Antonin Scalia, *The Rule of Law as A Law of Rules*, 56 U. CHI. L. REV. 1175, 1187 (1989).

281 Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989); see also *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock*, 513 U.S. 527, 549-50 (1995) (Thomas, J., concurring in judgment) (advocating rejection of "ambiguous balancing test" and return to bright-line rule in admiralty jurisdiction).

282 *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring); see also *City of Ladue v. Gilleo*, 512 U.S. 43, 60 (1994) (O'Connor, J., concurring) (stating that in First Amendment area, "fairly precise rules are better than more discretionary and more subjective balancing tests").

accorded the same constitutional protection as other forms of speech.

C. *The Wages of Confusion*

Because of the inconsistency of lower court decisions under the *Central Hudson* test, lawmakers have been emboldened to advance regulations on commercial speech that might be found invalid by the current Court, and which are wholly inconsistent with the original understanding of the First Amendment. At the national level, the Food and Drug Administration (FDA) and Federal Communications Commission (FCC) have recently begun to encroach upon areas of commercial speech that should be constitutionally protected. For example, former FCC Chairman Reed Hundt seized on the Fourth Circuit's decisions in proposing to restrict the broadcasting of advertisements for liquor, stating: "Surely [the *Anheuser-Busch* decision] means that the First Amendment is in no way violated by a prohibition on advertising hard liquor on shows and in time slots when kids are likely to be in the audience in large numbers—that applies like it or not to very late hours."²⁸³ His successor, William Kennard, has also indicated an interest in pursuing limits on spirits advertisements.²⁸⁴

In the same vein, on August 28, 1996, the FDA issued regulations intended severely to restrict the advertising and promotion of cigarettes and smokeless tobacco, ostensibly to protect those under eighteen.²⁸⁵ The breadth of the FDA's proposed restrictions was draconian and unprecedented. Specifically, the FDA sought to:

- prohibit any use of images or colors in most tobacco product advertising (outdoor, print, direct-mail), limiting such advertising to black text on a white background;²⁸⁶
- prohibit any outdoor advertising for tobacco products within 1000 feet of a public playground or an elementary or secondary school, including signs on stores stating that they sell tobacco. (In places such as Manhattan, this is tantamount to a ban on *all* outdoor

283 Richard T. Kaplar, *Court's Refusal to Hear Baltimore Billboard Appeals Sparks Flurry of New Restrictions*, COM. SPEECH DIG., Spring 1997, at 8.

284 See Bryan Gruley, *New FCC Chief Shows Willingness to Aid Firms Unable to Pay for PCS Licenses*, WALL ST. J., Nov. 4, 1997, at B11.

285 See Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396, 44,615-18 (Aug. 28, 1996) (to be codified at 21 C.F.R. pts. 801, 803, 804, 807, 820, 897). In the interests of full disclosure, I was retained by a tobacco manufacturer to present the First Amendment challenge to these regulations in district court on behalf of a coalition of advertising trade associations and tobacco manufacturers.

286 See *id.* at 44, 617.

tobacco advertisements.);²⁸⁷

- prohibit any sponsorship of any athletic, social, or cultural event under the name brand of a tobacco product (e.g., Winston Cup, Virginia Slims Tennis tournament; this ban would apply even if no children were in the audience, such as at a seniors golf tournament or an opera);²⁸⁸
- prohibit the sale or distribution of non-tobacco merchandise bearing any tobacco product brand name or logo (e.g., a Kool cigarette lighter or a Marlboro ashtray);²⁸⁹ and
- prohibit tobacco advertising in any medium not approved by the FDA, unless thirty days advance notice is provided to the agency.²⁹⁰

Furthermore, these rules barred companies from using color or images to advertise in any mass circulation magazine if more than 15% of the readers, or if two million of the readers, were minors, which is how the FDA defines an adult publication.²⁹¹ This could preclude tobacco advertising in *People*, *Sports Illustrated*, *Better Homes and Gardens*, and *Ebony*, to name just a few publications.²⁹²

At the state and local level, lawmakers are also attempting to restrict commercial speech about “socially harmful” products. After the Supreme Court denied certiorari in *Penn Advertising* and *Anheuser-Busch*, lawmakers across the country introduced or enacted similar ordinances restricting the outdoor advertising of tobacco products.²⁹³ Indeed, as stated above, at least fifteen local communities are or have been considering bills and ordinances restricting advertising of alcohol or tobacco products in some fashion.²⁹⁴ In many cities, lawmakers cited the success of the Baltimore ordinance as the impetus for bans on tobacco billboard advertising.²⁹⁵ Linda Dove, vice president of the American Association of Advertising Agencies, reported, “[The Association has] seen as many as 40 proposals in different stages and we expect more to come.”²⁹⁶ Without a

287 See *id.*

288 See *id.* at 44, 618.

289 See *id.* at 44, 617.

290 See *id.*

291 See *id.*

292 See 61 Fed. Reg. 44,596.

293 See *Efforts Grow to Curb Ads for Tobacco*, N.Y. TIMES, May 28, 1997, at A3; see also Kaplar, *supra* note 283, at 7-8.

294 See *supra* notes 19-22 and accompanying text.

295 See *Efforts Grow to Curb Ads for Tobacco*, *supra* note 293, at A3.

296 Kaplar, *supra* note 283, at 8.

definitive statement by the Supreme Court that truthful, nonmisleading commercial speech is entitled to heightened First Amendment protection, lower courts and local officials will continue to inhibit the free flow of protected consumer information.

D. 44 Liquormart—*A Move in the Right Direction*

In 1996, the Court suggested that it may be moving in the direction of the original understanding of the First Amendment, and may be willing to give heightened scrutiny to restrictions on the right to advertise. In *44 Liquormart, Inc. v. Rhode Island*,²⁹⁷ a unanimous Court struck down a Rhode Island prohibition on the advertising of retail prices of alcoholic beverages except at the point of purchase. The asserted purpose of the price advertising ban was to discourage alcohol consumption, in part by increasing the price of alcohol.²⁹⁸ A total of seven justices concluded that the advertising ban failed the fourth prong of *Central Hudson* because the State could have pursued its goal through “alternative forms of regulation that would not involve any restriction on speech.”²⁹⁹

At least five members of the Court acknowledged the importance of the colonial history of advertising regulation. Justice Stevens’s plurality opinion referred to colonial America’s solicitude for advertising, although it did not treat that history as determinative. Justice Stevens began his opinion by stating:

Advertising has been a part of our culture throughout our history. Even in colonial days, the public relied on “commercial speech” for vital information about the market. Early newspapers displayed advertisements for goods and services on their front pages, and town criers called out prices in public squares. Indeed, commercial messages played such a central role in public life prior to the Founding that Benjamin Franklin authored his early defense of a free press in support of his decision to print, of all things, an advertisement for voyages to Barbados.³⁰⁰

Justices Thomas and Scalia explicitly addressed the originalist argument in their concurring opinions in *44 Liquormart*. Justice Thomas relied on a variant of the historical argument set forth in Parts I and II in

297 517 U.S. 484 (1996).

298 See *id.* at 1508-09.

299 *Id.* at 1510 (principal opinion of Stevens, J., joined by Kennedy, Souter & Ginsberg, JJ.), 1518-19 (Thomas, J., concurring in part and concurring in the judgment), 1521-22 (O’Connor, J., concurring in the judgment, joined by Rehnquist, C.J., Souter & Breyer, JJ.).

300 *Id.* at 1504 (citations omitted).

rejecting the notion that there was any “philosophical or historical basis for asserting that ‘commercial’ speech is of ‘lower value’ than ‘noncommercial’ speech.”³⁰¹ Justice Scalia said that he shared Justice Thomas’s “discomfort with the *Central Hudson* test,” as well as his “aversion towards paternalistic governmental policies that prevent men and women from hearing facts that might not be good for them.”³⁰² Scalia pronounced the historical material presented by this author in an *amicus curiae* brief “consistent with First Amendment protection for commercial speech, but certainly not dispositive.”³⁰³ He then posed a number of historical questions, particularly about state legislative practices during the colonial and Reconstruction eras, as well as about “any national consensus that had formed regarding state regulation of advertising.”³⁰⁴ The answer to those questions, Scalia suggested, could determine whether he, too, would agree that commercial and noncommercial speech deserve the same measure of constitutional protection.³⁰⁵

44 *Liquormart* is important not only because of Justice Thomas’s explicit reliance on colonial history, Justice Scalia’s openness to considering this approach, and a recognition by three other justices of the relevance of colonial history to the analysis. It is also important because of the Stevens plurality opinion’s seeming willingness to jettison prongs two through four of the *Central Hudson* test. As Stevens said, “[W]hen a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.”³⁰⁶

Justice Stevens’s opinion in 44 *Liquormart* applies the *Central Hudson* test in a manner more akin to the test the Court applies to noncommercial speech. Stevens further strengthened the principle, stated earlier in *Discovery Network* and *Coors Brewing*, that a restriction on commercial speech cannot be considered “sufficiently tailored to its goal” under *Central Hudson* if other options exist “which could advance the Government’s asserted interest in a manner less intrusive to . . . First Amendment rights.”³⁰⁷ Applying what appeared to be a narrow-tailoring requirement, the plurality in 44 *Liquormart* seems to say that the government may not restrict commercial speech at all if non-speech-

301 *Id.* at 1518 (Thomas, J., concurring in part and concurring in the judgment).

302 *Id.* at 1515 (Scalia, J., concurring in part and concurring in the judgment).

303 *Id.*

304 *Id.*

305 *See id.*

306 *Id.* at 1507 (principal opinion of Stevens, J., joined by Kennedy & Ginsburg, JJ.) (discussing a number of policy reasons for applying a higher level of scrutiny to bans on truthful, nonmisleading commercial speech).

307 *Coors Brewing*, 514 U.S. at 490-91.

restrictive alternatives are available to serve the government's interest. As Justice Stevens observed:

[A]ttempts to regulate speech are more dangerous than attempts to regulate conduct. That presumption accords with the essential role that the free flow of information plays in a democratic society. As a result, the First Amendment directs that government may not suppress speech as easily as it may suppress conduct, and that speech restrictions cannot be treated as simply another means that the government may use to achieve its ends.³⁰⁸

Justice Stevens identified non-speech-restrictive alternatives that undermined the State's claim of reasonable fit. Justice Stevens explained why "[t]he State . . . cannot satisfy the requirement that its restriction on speech be no more extensive than necessary":

It is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State's goal of promoting temperance. As the State's own expert conceded, higher prices can be maintained either by direct regulation or by increased taxation Per capita purchases could be limited as is the case with prescription drugs. Even educational campaigns focused on the problems of excessive, or even moderate, drinking might prove to be more effective.

As a result, even under the less than strict standard that generally applies in commercial speech cases, the State has failed to establish a 'reasonable fit' between its abridgment of speech and its temperance goal.³⁰⁹

Thus, even though Justices Stevens, Kennedy, and Ginsburg did not expressly accept the original understanding of the First Amendment's protection of commercial speech, the 44 *Liquormart* plurality opinion does suggest that these justices might be willing to afford greater protection for commercial speech than the *Central Hudson* test currently contemplates.

Even those justices explicitly relying on the four-factored *Central Hudson* test appeared to apply stricter scrutiny to the truthful, nonmisleading commercial speech at issue in the case than the *Central Hudson* test often requires. The concurring opinion of Justices O'Connor, Souter, Breyer, and the Chief Justice determined that a ban on advertising of liquor prices was not significantly related to the purported interest to

308 44 *Liquormart*, 517 U.S. at 512.

309 *Id.* at 507.

pass scrutiny under the fourth prong of the *Central Hudson* analysis.³¹⁰ Justice O'Connor echoed Justice Stevens when she wrote:

The availability of less burdensome alternatives to reach the stated goal signals that the fit between the legislature's ends and the means chosen to accomplish those ends may be too imprecise to withstand First Amendment scrutiny.

....
The fit between Rhode Island's method and [its temperance] goal is not reasonable. If the target is simply higher prices generally to discourage consumption, the regulation imposes too great, and unnecessary, a prohibition on speech in order to achieve it. The State has other methods at its disposal—methods that would more directly accomplish this stated goal without intruding on sellers' ability to provide truthful, nonmisleading information to customers A tax, for example, is not normally very difficult to administer and would have a far more certain and direct effect on prices, without any restriction on speech. The principal opinion [by Justice Stevens] suggests further alternatives, such as limiting per capita purchases or conducting an educational campaign about the dangers of alcohol consumption. The ready availability of such alternatives—at least some of which would far more effectively achieve Rhode Island's only professed goal, at comparatively small additional administrative cost—demonstrates that the fit between ends and means is not narrowly tailored.³¹¹

In sum, the opinion seems to say that when the government can advance its goal through direct regulation of conduct and other non-speech-restrictive means, the government may not pursue that goal by restricting otherwise lawful speech.³¹² This approach more closely resembles the least restrictive means analysis employed under a strict scrutiny test of the sort employed in assessing government restrictions on

310 See *id.* at 504-08 (principal opinion of Stevens, J., joined by Kennedy, Souter & Ginsburg, JJ.), 528-30 (O'Connor, J., concurring in the judgment, joined by Rehnquist, C.J., Souter & Breyer, JJ.).

311 *Id.* at 529-30 (citations omitted); see also *id.* at 524-25 (Thomas, J., concurring in part and concurring in the judgment).

312 This analysis is also consistent with earlier opinions by the Court. See *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487-88 (1995) (prohibiting alcohol content being displayed on labels, but permitting it in advertisements unless prohibited under state law); *Edenfield v. Fane*, 507 U.S. 761, 764 (1993) (prohibiting CPA's "direct, in-person, uninvited solicitation"; permitting other means); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 470-73 (1988) (prohibiting lawyers' targeted, direct-mail solicitation for pecuniary gain; permitting other modes of written advertising); *Bolger v. Young Drug Prod. Corp.*, 463 U.S. 60, 62-63 (1983) (prohibiting mailing of contraceptive advertisements; permitting other means of contraceptive advertising); *Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85, 86 (1977) (prohibiting "For Sale" and "Sold" signs; permitting same information to be conveyed by other means).

so-called "fully protected" speech. Although seven justices have not openly accepted an originalist understanding of the First Amendment protection of commercial speech, the analysis employed in *44 Liquormart*, if applied consistently, will often produce results consonant with that understanding. By applying a standard more like that applied in noncommercial speech cases, the Court inches closer to adopting an interpretation of the First Amendment that is consistent with its original meaning.

Conclusion

This Article demonstrates that the Supreme Court's recent approach to commercial speech has been neither principled nor consistent. It has been unprincipled because, as a doctrinal matter, the Court continues to resist the conclusion compelled by the historical evidence presented above: that neither the generations of the Framers nor of those who drafted the Fourteenth Amendment believed commercial speech to be of less value than other categories of speech. Perhaps resulting from this improper historical understanding of the First Amendment's meaning, the Court's commercial speech jurisprudence has been inconsistent as well; although the Supreme Court generally has required the government to bear a heavy burden in its efforts to justify restrictions on commercial speech,³¹³ in a handful of cases the Supreme Court has suggested that the judgment of legislators about advertising and its effects ought to be given deference.³¹⁴ Therefore, for both principled and prudential reasons, the Court should renounce the *Central Hudson* balancing test, and afford commercial speech full constitutional protection.

Moreover, giving heightened scrutiny to restrictions on truthful commercial messages about lawful products and services would have the salutary effect of constraining politicians. The proposed analysis would avoid the danger of unlawful censorship that will exist so long as commercial messages are formally subjected to a reduced level of constitutional protection—where suppression of speech remains a potential tool for policymakers seeking to influence consumer choice and where the outcome of each case turns on the subjective evaluations of individual administrators, legislators, and judges. In addition, the adoption of a categorical approach would eliminate much of the confusion and inconsistency that has marked efforts by the lower courts to implement the existing four-part "balancing test."

313 See *supra* notes 221-235 and accompanying text.

314 See *supra* notes 251-254 and accompanying text.

Furthermore, the historical evidence presented here has broader implications for the First Amendment generally. It suggests that the generation of the Framers had in mind a dichotomy not between commercial and noncommercial speech, but instead between truth and falsity. Plainly, under a truly "originalist" First Amendment jurisprudence, false commercial speech—fraud—could be regulated, as could libelous statements about individuals.³¹⁵ Furthermore, other categories of demonstrably and deliberately false speech—for instance, false scientific speech—could presumably be constitutionally regulated and punished if it were to cause identifiable harm to a particular individual.³¹⁶ However, such a standard would not require that the Supreme Court in any way scale back its rigorous protection of political speech; the Court has properly observed that "under the First Amendment there is no such thing as a false idea,"³¹⁷ and the inability to test and prove whether a political idea is "true" would ensure that such speech remains constitutionally protected.

Notwithstanding the other potential implications of this Article's historical analysis of First Amendment doctrine, it is evident that the Court's current jurisprudence is underinclusive in one critical respect: it provides less protection than is warranted for truthful commercial communications about lawful products and services. In one of the decisions in which the Supreme Court properly protected commercial speech, the Court noted:

So long as we preserve a predominantly free enterprise economy, the allocation of our resources will be made through numerous private economic decisions. It is a matter of the public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.³¹⁸

Adhering to such a principle does not mean that people will never be misled or offended even by truthful advertisements. Nor does such a principle guarantee that people will always make the right decisions. But

315 The Supreme Court currently acknowledges that false and defamatory statements about individuals are not constitutionally protected. See *New York Times v. Sullivan*, 376 U.S. 254 (1964). However, to avoid a "chilling" effect on political discourse, the Court has afforded constitutional protection even to false and defamatory statements on matters of public concern as long as the person making the statement does not do so with "actual malice." *Id.* at 21. It is beyond the scope of this Article to discuss in detail the merits of the constitutionalization of libel law.

316 Of course, to say that such a category of speech may be outside the bounds of the First Amendment does not mean that the legislature should, as a policy matter, regulate it. There may be sound public policy reasons why a legislature may wish to forbid lawsuits against those who deliberately disseminate demonstrably false scientific information under certain circumstances, for example.

317 *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974).

318 *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976).

in order to “preserve a predominantly free enterprise economy,” the American people must be trusted with “a free flow of commercial information” unhindered by concerns about government interference. Accepting an interpretation that the original understanding of the Framers was to protect commercial as well as noncommercial speech is the best way to guarantee that the First Amendment will preserve individual liberty and economic freedom.